IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

JAMES R. JETTON, Revenue Agent, Etc., et al.,
Appellants,

vs. } No. 488

UNIVERSITY OF THE SOUTH,
Appellee.

BRIEF ON BEHALF OF APPELLANTS.

STATEMENT OF CASE.

This cause is before this court, on appeal, to review and reverse a decree sustaining and granting the relief sought by a bill in equity filed, in the Circuit Court of the United States for the Middle District of Tennessee, by appellee University of the South, an educational institution incorporated under the laws of Tennessee, and B. L. Wiggins and others named in the bill, as lessees of appellee—all citizens of the State of Tennessee—against appellants, also citizens of the same State, to enjoin the

prosecution of certain proceedings or suits instituted by appellant Jetton, one of the Revenue Agents of the State of Tennessee, before appellant Osborne, Trustee of Franklin County, sitting as a special court, against said Wiggins and others named in the bill, for the purpose of having valued and back-assessed for taxation the interests of said Wiggins and the other lessees in and to certain leaseholds and the improvements erected thereon by said lessees under written agreements of lease from appellee, the owner in fee of the leased premises—the interest of appellee therein being exempt from taxation.

The Bill.

The material averments of the bill are as follows:

The charter of the University of the South was granted by the General Assembly of Tennessee in 1858, and among the other powers, privileges or immunities therein contained, is the following:

"Section 10. *Be it further enacted*, That said University may hold and possess as much land as may be necessary for the buildings, and to such extent as may be sufficient to protect said institution, and the students thereof, from the intrusion of evil-minded persons who may settle near said institution; said lands, however, not to exceed 10,000 acres, 1,000 of which, including the buildings and other effects, and property of said corporation, shall be exempt from taxation so long as said lands belong to said University."

Rec., pp. 2-6.

As authorized by its charter, appellee acquired title to a large body of mountain land at Sewanee, in Franklin County, Tennessee, and in November, 1861, had surveyed out and laid off 1,000 acres of said land, which thereafter was known as the University Reservation, which appellee under its charter, as aforesaid, claimed to hold and held free from taxation.

Prior to 1887, appellee had, on the said Reservation, laid off a town site, called Sewanee, and leased a large number of lots for various terms from ten to thirty-three years, with renewal privileges, to persons agreeing to erect thereon buildings and improvements of a certain designated value, and the rentals derived from these leases were covered into the treasury of the University and used for the purposes for which it was created. Thereupon, the State of Tennessee and Franklin County attempted to assess to and against appellee University all of said 1,000 acres that had been leased by it to different persons, as above stated; whereupon, appellee University filed an original injunction bill in the Chancery Court of Franklin County against A. J. Skidmore, the then Trustee of said county, to enjoin him from assessing said property for State and county taxation, upon the ground that said property was still owned by and belonged to said University,

and was, therefore, exempt from taxation under the tenth section of its charter, above set out.

Rec., pp. 8, 49-56.

Whereupon, Franklin County filed an original bill in the nature of a cross bill in said cause, claiming the right to assess and back-assess said property, insisting that said University, by leasing out said property, had lost its right of exemption from taxation.

Rec., pp. 8, 57-63.

Issues were made under said original and cross bills, and upon the record submitted to the Chancellor he decreed that all of said leased property, except that occupied by the professors and officers of the University, was subject to taxation, but upon appeal to the Supreme Court of Tennessee the decree of the Chancellor was reversed and it was, in effect, held and decreed by the Supreme Court of Tennessee that the charter exemption "from taxation so long as said land belongs to" said University, remains in force so long as it retains the title thereto, and that it had not so far renounced title as to defeat the exemption by giving leases for from one to thirty-three years, with renewal options, to divers persons who had built up a village thereon—the annual rents being reserved and devoted exclusively to the purposes of the University. The record in said cause, which was entitled University of the

South v. Skidmore, Trustee, including the decree and opinion of the Supreme Court of Tennessee, was filed as an exhibit to the original bill in this cause. The decree of the Supreme Court of Tennessee is found in the printed record at pages 153 to 155, inclusive, and the opinion of said court is, as stated in the bill in this cause, reported and published under the style of—

University of the South v. Skidmore, 87 Tenn., pp. 155 et seq.

The bill further charges that "notwithstanding the holding of the Supreme Court of Tennessee that this contract of exemption was valid and applied to the property leased, as well as that actually occupied by the school buildings of the University," State Revenue Agent Jetton, appellant herein, as he was authorized to do under the statutes of Tennessee, caused to be issued by appellant Osborne, Trustee of Franklin County, the proper official charged with such duty, notices to the lessee complainants and about 160 other lessees of appellee University, to appear before said Trustee on the 13th day of August, 1906, for the purpose of being assessed and back-assessed upon their leasehold interests in said property for the years 1903, 1904, 1905 and 1906.

Rec., pp. 9-11.

The form of lease executed by appellee Univer-

sity to each of its several lessees was exhibited with the original bill in this cause, as a part of the record in the case of University of the South v. Skidmore, and is as follows:

Memorandum of an agreement made this — day of ——, A. D., — between the University of the South, party of the first part, ——, party of the second part; Witnesseth that the said party of the first part doth hereby lease to the said party of the second part all that certain lot and premises, situated at Sewanee, Franklin County, Tennessee, being part of the domain of the said university of the South and described as follows:

for a period — years, from said date, at an annual rental of —— dollars per year, payable each year in advance, and this lease being expressly made subject to the provisions of the charter, constitution and statutes of said University of the South, as well also to the regulations for leasing the domain of said University of the South, established by the Board of Trustees. And the said party of the sec-nd part agrees with the said party of the first part that — will pay the rent above specified in manner aforesaid, and all taxes and assessments upon said premises; —— doth further covenant and agree that during the said term hereby granted — will not, nor shall — heirs or assigns, sell or permit to be sold upon said premises hereby leased, any ale, beer, wine or any liquors whatever; nor allow any gambling of any description upon said premises; nor allow to be kept therein any billiard table, shooting gallery, or bowling alley, unless permission to keep the same shall have been given by the Commissioner of Buildings and Lands; nor suffer any business to be carried on injurious to the interests of the university; nor permit the erection thereon of any church, chapel or place of religious worship, without the consent in writing of the said University of the South.

And it is further agreed That the said premises shall not be sub-let nor this lease assigned without the consent in writing of the Commissioner of Buildings and Lands. And it is further covenanted and agreed that any violation of the above restriction and provisions shall cause this lease to end and determine, with a right to said party of the first part to re-enter upon said premises. And it is further agreed that in all cases of transfer
154 the University of the South shall have the refusal and at the expiration of the present term, the University of the South shall have the option of taking the premises by paying for all improvements made thereon, or may renew the lease for another term of — years, on such terms as may be agreed upon by the parties, respectively, and may also give a second renewal for — years; and in case the parties cannot agree upon the value of the improvements or the rental to be paid for the new term, the same shall be determined by arbitration, one of the arbiters to be selected by the Commissioner or Buildings and Lands and the other by the lessee; and, in case they cannot agree, they shall call in an umpire; provided, however, that in fixing the rental for the new term, the value of improvements shall not be taken into account as against the said party of the second part, heirs or assigns. And it is further agreed that improvements to the value of —— hundred dollars be made and kept on said premises by the party of the second part.

In witness whereof The said parties have hereunto sett heir hand and seals, the year and day first above written.

—— ——. [L. S.]

For the University of the South.

—— ——, [L. S.]

Rec., 139, 140.

The bill further shows that on August 13, 1906, the lessees so notified as aforesaid, by their attorneys appeared before said Trustee "when the cause of

Mrs. Hoeffer (one of the lessees) was called, heard and determined by said Trustee," and although the attorneys of complainants in this cause presented and interposed as a defense to said proceedings the charter of appellee University, and the holding of the Supreme Court of Tennessee thereon, as hereinbefore set out, insisting that said property was exempt from taxation, said Trustee held and adjudged that the leasehold interest of Mrs. Hoeffer in the lot described in her lease and the buildings thereon were subject to taxation, and assessed the same upon a valuation of $500.

Rec., pp. 11, 12.

The bill further shows that said Trustee continued the case pending against the other lessees named in the bill until September 10, 1906, and announced that under the same facts—existing in the cases of the other lessees—he would assess their property in the same manner; whereupon on September 8 (Rec., p. 1), the bill in this cause was filed.

The bill further charges that the assessment made against Mrs. Hoeffer and that proposed to be made against the other lessees was under the authority of the general assessment act of Tennessee, known as Chapter 258 of the Acts of 1903, Section 1 of which provides:

"That all property, real, personal and mixed, shall be assessed for taxation for State, county and municipal purposes, except such as is declared exempt in the next session."

By the next, that is, the second section of said act, it is provided:

"That the property herein enumerated, and none other, shall be exempt from taxation."

The first, third, fourth, fifth and sixth subsections of Section 2, referred to property owned by the general government, the State, counties and municipalities of the State, and other classes of property not necessary to be here referred to, but subsection 2, set out in the bill, is as follows:

"All property belonging to any religious, charitable, scientific or educational institution, when used exclusively for the purpose for which said institution was created, or is unimproved and yields no income. All property belonging to such institution used in secular business and competing with a like business that pays taxes to the State, shall be taxed on its whole or partial value in proportion as the same may be used in competition with secular business."

Rec., p. 13.

The bill further charges that "no provision is made in this act for the protection of property exempted from taxation by charters of incorporation, and educational institutions such as the complainant University, except by the terms of subsection 2

of the second section of the act above set out," which it was averred is much less comprehensive than the provision of Section 10 in complainant's charter.

Rec., p. 13.

The bill further charges that at the time of the granting of the charter to appellee University, and of the execution of the several leases by appellee, hereinbefore referred to, leasehold interests were assessed to the lessor, but that the Legislature of Tennessee had attempted to change this rule and make the lessees liable for taxes by subsection 5 of Section 5 of said act, which is as follows:

"That hereafter all mineral, timber or other interests in fee, for life or for a term of years in real estate of this State, owned separate from the general freehold, shall be assessed to the owner thereof separate from the other interests in such real estate, which other interests shall be assessed to the owner thereof, all of which shall be assessed as real estate."

Rec., pp. 13, 14.

The bill further averred that, by Section 32 of said act, set out in the bill (Rec., pp. 13, 14), it was, among other things, provided that the taxes assessed under said act "shall be a lien upon the fee in said property, and not merely upon the interest of the person to whom said property is, or ought to be, assessed, but to any and all other interests in said property, whether in reversion or remainder, or of lienors, or of any nature whatever, and the whole pro-

ceeding for the collection of taxes, from the assessment to sale for delinquency, shall be a proceeding *in rem,*" and thereupon it was charged that the taxes sought to be assessed against the lessees will be a lien upon the fee belonging to appellee University, which is exempt to it under its charter, and the fact that this property so owned by the University was exempt from taxation was taken into consideration in fixing the amount of rent to be paid to the University at the time its several leases were executed. So that, as said leases are renewed, the University will be unable to collect the same amount of rental as it otherwise could, for the reason that the amount of taxes to be paid would necessarily be taken into consideration and be deducted from the amount of rents which the lessees would otherwise be able and willing to pay, that the whole tax will be a direct burden on appellee University, and that the provisions of said act of 1903 under which said taxes are sought to be levied, impairs the contract and nullifies the charter exemption of appellee University, hereinbefore set out, and, therefore, that said act is "in derogation of Section 10, Article I, of the Constitution of the United States, prohibiting any State from passing any law impairing the obligation of a contract."

The bill further charges that the provisions of said act of 1903, providing that taxes assessed against

the lessee shall become a lien on the title of the owner of the property without any notice or process to the owner having been sustained by the Supreme Court of Tennessee, violates the 14th amendment to the Constitution of the United States, in that it provides for the taking of property without due process of law, and because it denies the equal protection of the laws.

Rec., pp. 15, 16.

The bill further averred that under an amendment to its charter "certain municipal privileges" were conferred upon appellee University, but that such privileges were never in fact exercised, and that the phrase "taxes and assessments," used in the form of lease hereinbefore set out, referred to "municipal taxes and assessments at one time contemplated."

Rec., pp. 18, 19, 139.

Thereupon, complainants in the original bill, having averred that the bill was brought in order to avoid a multiplicity of suits and to prevent a "cloud upon the title" of appellee University, and averring that it was without remedy except in a court of equity, prayed, among other things, that appellants, Jetton as Revenue Agent and Osborne as Trustee, be enjoined from further proceeding with the assessment "of the property of the University of the South" and "the leasehold interests . . . . in

and to any part or parcel of the 1,000 acres reserved and exempted domain of the University of the South," and that appellant Osborne as Trustee be enjoined from attempting to collect the taxes assessed against Mrs. Hoeffer on her leasehold interest, as set out in the bill, and that on the final hearing the injunction be made perpetual.

Rec., pp. 16, 19.

A restraining order was issued in accordance with the prayer of the bill (Rec., p. 20), and thereupon the defendants interposed a

DEMURRER,

which challenged the jurisdiction of the court and the sufficiency of the bill upon the following grounds:

(1) That both complainants and defendants are citizens of the State of Tennessee, and no Federal question was presented by the bill; (2) that as to the lessee complainants, citizens of Tennessee, no ground of Federal jurisdiction is presented or claimed; (3) that the court is without power to grant an injunction to restrain the proceedings pending before the Trustee as a special court of the State, having jurisdiction of the matters therein involved; (4) that the suit is, in legal effect, against the State of Tennessee; (5) that the bill is without equity on

its face; (6) that complainants have a complete and adequate remedy at law; (7) that the bill shows that no taxes are sought to be assessed against complainant University, and therefore it has no ground of complaint; (8) that the exemption contained in the charter of the University does not extend to the lessee complainants, and therefore the bill cannot be maintained for them.

Rec., pp. 23, 24.

The second ground of demurrer was sustained and the bill dismissed as to the lessee complainants (Rec., pp. 35-43); but as to the complainant University of the South, the demurrer was overruled and the bill sustained—the court holding that the assessment proceedings before the Trustee under the act of 1903 constituted an impairment of the rights of the University under its charter, and that therefore said *act was in violation of both the State and Federal Constitutions.* A temporary injunction was granted, in accordance with the prayer of the bill.

Rec., pp. 35-42, 43.

Thereupon, defendants in the court below, appellants here, made application for a modification of the order granting a temporary injunction so as to permit an assessment to be made but continuing the injunction against any attempt to collect the taxes, in order that the statute of limitations might not run

in favor of the lessees, and also to require complainant to give bond to cover the amount of the taxes, $14,000, shown by the bill to be involved in this cause; but said application was denied and the injunction allowed to stand as ordered and without bond.

Rec., pp. 44-48, 192.

Answer.

Whereupon, the defendants in the court below, appellants here, filed an answer, the averments of which, material to be stated, are as follows:

First—The charter and organization of the University of the South and its ownership of the land whereon the leases in question were given, are admitted.

Second—That the thriving town of Sewanee, with a population of more than one thousand, had been built upon the 1,000 acres exempt to the University under its charter, and that the buildings and improvements thereon had been erected by lessees of the University under leases identical in form with that set out in Exhibit A to the bill (Rec., pp. 139, 140), by which the lessees agreed to pay "all taxes and assessments upon the premises" leased and to erect thereon certain improvements of a designated value, which buildings and improvements, however,

under and by the terms of said leases, were intended to be, and are, the property of the lessees.

Rec., pp. 26 and 27.

Third—The institution in the Chancery Court of Franklin County in 1887 of the suit by appellee University against the county of Franklin and its subsequent determination, upon appeal, by the Supreme Court of Tennessee in favor of appellee University, was admitted, but the averment of the bill that the Supreme Court of Tennessee held and decreed that the leasehold estates were not subject to taxation was denied and the record and opinion of the Supreme Court exhibited with the bill is referred to as showing that the question of taxing the leasehold estates or the interests of the lessees under their respective leases was not involved or adjudicated in that suit, and that the lessees owning the improvements upon the leased premises were not before the court in that cause.

Rec., pp. 27 and 28.

Fourth—It is admitted and averred that ever after the decision of the Supreme Court in said cause of University of the South v. Skidmore, Trustee, no effort or attempt has been made by any officer of the State of Tennessee or county of Franklin to assess against appellee University any property lying within its reservation of 1,000 acres, and that both the State and county have at all times recognized

that said property as to appellee University is exempt from taxation or any lien or charge on account of taxes of any kind whatsoever to the full extent adjudicated by the Supreme Court of Tennessee, as above set out.

Rec., p. 28.

Fifth—It is admitted that the defendant (appellant here) Jetton is one of the Revenue Agents of the State of Tennessee, clothed with power to institute proceedings for the purpose of having properly assessed property which has escaped assessment, and that the defendant (appellant here) Osborne is the Trustee of Franklin County, and as such, under the act of 1903, constituted a special tribunal or court for the hearing and determination of questions of back or reassessment for taxes. The institution by defendant Jetton of the proceedings before said Trustee and his adjudication in the case against Mrs. Hoeffer, and the continuance of the suits against the other lessees from August 13 to September 10, as averred in the bill, are admitted; and it is also averred that, though Mrs. Hoeffer excepted to the action of the Trustee in assessing the value of her improvements or leasehold interest, she did not appeal to the State Board of Equalization, a tribunal or court, specially clothed with power to hear and determine appeals from a Trustee upon such questions,

as she was entitled to do under the statutes of Tennessee.

Rec., pp. 28, 29.

Sixth—That the proceedings before the Trustee against the lessees was under the authority of the act of 1903, Chapter 258, was admitted, but that said act and the Constitution and laws of Tennessee do not recognize that the 1,000 acres reserved by appellee University, as hereinbefore shown, is exempt from all and every species of taxation as against said University is specifically denied, *and said exemption in favor of said University is expressly admitted, and defendants disclaimed any power to assess, or any intention of assessing, or levying any tax whatsoever, against the property of appellee University,* and denied that the assessment of the interests of the several lessees of appellee University in the buildings and improvements erected by them upon said property would in any manner affect the interest of appellee University; and further denied that the act of 1903 in any manner impairs the obligation of the charter of appellee University, but insisted that the exemption granted by said charter is personal to the University and cannot be extended so as to protect the property interests of its lessees from lawful assessment under said act.

Rec., pp. 29, 30.

Seventh—Further, it is averred that no lien can be claimed upon the property of appellee University, or any interest of said University in said property under and by virtue of Section 32 of the act of 1903, because said property is exempt from taxation under and by virtue of the Constitution and laws of the State of Tennessee, and any attempt to create or enforce a lien on said property would be in violation of the laws of Tennessee, but that no effort to place a lien on said property belonging to said University has been made, or would be attempted, by defendants or other officers of the State of Tennessee and county of Franklin.

Eighth—While admitting that the University may derive a large revenue from the rentals accruing under the leases to its several lessees, nevertheless, defendants denied that a tax against the property interests of the lessees is a tax against the University, and they also denied that the tax sought to be assessed against the interests of the lessees would in any manner affect the amount of rents received by the University, because the lessees expressly agree to pay all assessments and taxes, and for the further reason that the rentals paid by the lessees are fixed in the contracts and cannot be lessened by the payment of taxes or in any manner affected by the value of the improvements, as is expressly provided in said leases, and that the rentals charged by the Uni-

versity are in the nature of a mere ground rental, without regard to the value or character of the improvements.

Ninth—It is further averred that under the leases executed by appellee University, the several lessees became the absolute owners of the improvements erected by them upon the leased premises, and that such improvements were treated and dealt with both by the University and the lessees, as the property of the lessees by effecting insurance thereon for the benefit of the lessees and by other acts of ownership; and that a number of the leases were owned by one lessee—and in several cases, such lessees are non-residents—and the improvements and buildings are rented out to merchants and other residents as an investment.

Rec., p. 32.

Tenth—Defendants denied that the "taxes and assessments" referred to in the several leases—which the lessees covenant to pay—refer only to such municipal taxes as might be levied by the University, and averred that said taxes and assessments so referred to in said leases were intended to cover, and did cover, all taxes which may be levied by authority of law.

Rec., p. 33.

Eleventh—Defendants averred that it was not intended by the proceedings instituted before the Trustee of Franklin County to reach or affect any interest of the University in its exempt property, and denied that the taxes actually assessed against Mrs. Hoeffer upon her interest in her leasehold estate constituted a lien upon the interest or title of the University, and denied that under the proceedings either against Mrs. Hoeffer or the other lessees any judgment could be rendered which would become a cloud or lien upon the title of the University to said property.

Twelfth—Defendants denied that the complainant was without a plain, adequate and complete remedy at law.

Rec., p. 33.

Facts.

The facts developed by the proof are practically without dispute, and, in brief, are as follows:

That within the reservation of 1,000 acres appellee University laid off a town site—some of the lots containing more land than others and being more desirably situated—and thereon has been built the town of Sewanee, having a population of about 1,200 inhabitants. (Rec., p. 157.) That the buildings and improvements in this town have been erected by be-

tween 160 and 170 lessees, under leases running from 10 to 33 years, renewable for two terms and in form identical with that contained in Exhibit A to the original bill in this cause (Rec., pp. 139, 140), and which has been hereinbefore set out; that the rentals paid by the lessees are not based upon the value of the improvements, but are a mere ground rent (Rec., p. 142), ranging, as shown in the schedule exhibited with the deposition of R. M. Dubose, treasurer of the University (Rec., pp. 183-190), from $1 to $37.50 per annum—the greater part of said rentals being below $25 per annum; that many of the leases are owned by lessees who do not live upon the leased premises, but rent the same with the improvements thereon to other persons as an investment, and that when the lessees desire to insure the value of their improvements against fire, the property is treated and described as their own by and with the consent of the treasurer and commissioner of buildings and lands, having full authority over these matters, who is an insurance agent, and has written many of the policies insuring said properties, for the benefit of the lessees.

Rec., pp. 177-182.

It is claimed by the University that many years ago—more than thirty—it sought to establish some sort of a municipal government over the town of Sewanee, and that it was at that time that the gen-

eral form of lease hereinbefore referred to was adopted, and that the "taxes and assessments," referred to in said leases, meant municipal taxes, but it is admitted that said scheme of municipal government was never inaugurated, and that the same form of lease as hereinbefore set out has been in continual use for more than thirty years, and is still used by the University in dealing with its lessees.

Final Decree.

Upon the record thus made, the court affirmed its holding and opinion rendered upon the hearing of the demurrer, and perpetually enjoined appellants "from assessing or attempting to assess and tax the property and leasehold interests as described and complained of in the bill," and decreed "that said property and leasehold interests are not subject to assessment or to the levy and collection of taxes," as attempted and set out in the bill.

Rec., pp. 190, 191.

From the aforesaid decree of the Circuit Court, defendants prayed an appeal, and having duly filed in the court below their assignment of errors, said appeal was granted.

Rec., pp. 193, 198.

Assignment of Errors.

Come now the appellants and say that the decrees of the Circuit Court in overruling their demurrer as to appellee University (Rec., pp. 42, 43), and in granting the relief sought and set out in the final decree (Rec., pp. 191, 192) are erroneous, because:

First—No Federal question is made by the bill—

(a) The act of 1903, Chapter 258, when properly construed, does not impair appellee University's charter exemption, and therefore does not contravene the Federal Constitution;

(b) If said act of 1903 is in contravention of the Constitution of the State of Tennessee, as held by the Circuit Court, it never had the force of a law and was never enacted into a law within the meaning of that provision of the Federal Constitution prohibiting a State from passing a "law impairing obligations of contracts."

Second—The Circuit Court was without power to grant an injunction to stay the proceedings pending before the Trustee of Franklin County—a tribunal or court of the State of Tennessee having sole jurisdiction and power under laws of said State to determine whether property omitted from the assessment rolls is subject to taxation.

Third—The Circuit Court, sitting as a court of equity, has no jurisdiction of the matters involved in the bill.

Fourth—The property of appellee University has not been assessed, nor has it been attempted to assess said property, for taxation, and appellants, representing the State of Tennessee and county of Franklin, expressly disclaimed the right to assess the property of appellee for taxation or place any lien thereon, and expressly admitted that said property is exempt from taxation as against appellee.

Fifth—Appellee University's admitted exemption from taxation is personal to it, and cannot be extended to cover the property interests of its lessees, so as to protect from taxation as against said lessees their leasehold estates and the improvements thereon owned by them.

Sixth—The court erred in holding and decreeing that the property rights in and to the improvements erected by the several lessees of appellee under their respective leases are not subject to assessment for taxation.

Seventh—The court erred in not holding that the State of Tennessee has power under and by virtue of its Constitution and the act of the General Assembly of 1903, Chapter 258, to assess for taxation the

property and interests which the several lessees of appellee University have in and to the leasehold estates and improvements erected by them under their respective leases upon the property owned by and exempt from taxation against appellee.

Eighth—The court erred in perpetually enjoining appellants from assessing or attempting to assess and tax the property rights and leasehold interests in the several lessees of appellee, because, in any event, said injunction should have been restricted to proceedings under Chapter 258 of the Acts of 1903, whereas the decree is so broad that the State and county are virtually enjoined from attempting to make any assessment whatsoever against the leasehold interests of said lessees, under any statute.

Ninth—The court erred in not adjudging that the proceedings instituted by appellant Jetton, Revenue Agent, before Appellant Osborne, sitting as a special court or tribunal for the back-assessment of taxes, were not intended in any way to affect, nor did they in any way affect, appellee, and that no claim is made, either by the State of Tennessee or county of Franklin, that the property of appellee (within the area described in the bill) is subject to taxation.

Tenth—The court erred in not dismissing the bill and denying any relief whatsoever to appellee.

BRIEF AND ARGUMENT.

I.

We submit—

That no Federal question was made by the bill.

The bill showing that all of the parties, complainant and defendant, are citizens of the same State, it was sought to confer jurisdiction upon the Circuit Court solely upon the ground that the lands of appellee University within the reservation described in the bill and which, to a large extent, had been subdivided into lots and leased to various parties for terms varying from ten to thirty-three years, upon which the improvements sought to be taxed have been erected, are exempt from taxation by reason of the provision in the charter of appellee that said lands shall be exempt from taxation so long as they belong to it, and that said lands being so exempt the State is without power to tax the leasehold interests which have been created therein and the improvements which have been erected thereon, under and by virtue of the several leases executed by appellee, as shown in the bill.

To state it differently, it is insisted by appellee that its contract rights, as defined in its charter, may be impaired by reason of possible clouds upon its

title to said lands, resultant from and growing out of the tax proceedings instituted under the statutes of Tennessee against appellee's lessees as the owners of interests in their leases and the improvements made upon the leaseholds.

It is admitted by both the State and county of Franklin that the 1,000 acres of land belonging to appellee and reserved in pursuance of the 10th section of its charter is exempt from all species of taxation against appellee and that it will remain exempt from taxation so long as it is owned by appellee. This was solemnly adjudged by the Supreme Court of Tennessee in the case instituted in 1887 by appellee against Skidmore, then Trustee of Franklin County, and reported in 87 Tenn., 155 et seq., wherein appellee's charter was construed and its rights thereunder adjudged in accordance with the Constitution of the State of Tennessee (Art. I, Section 20), which provides that—

"No law impairing the obligations of contracts shall be made."

It will be borne in mind that the record in the Skidmore case, including the final decree and opinion of the Supreme Court of the State of Tennessee—the final arbiter in respect of the construction and

application of the Constitution and statutes of Tennessee—are exhibited with the bill and by apt averments made a part of appellee's case.

It is to be noted that no attempt was made to assess the property of appellee—nor was any claim set up that the interest of appellee in and to said property is subject to taxation, and it is here proper to call the attention of the court to the solemn admission of appellants, representing the State and county of Franklin, as to the continuing binding force of the adjudication of the Supreme Court of Tennessee that said property is exempt from taxation against appellee, and to the express disclaimer of any intention to assess appellee's property.

But, notwithstanding this, appellee contends that its charter is impaired by the provisions of the Tennessee assessment act of 1903, Chapter 258.

In reply, we submit:

That the Assessment Act of 1903, when properly construed, does not in any way affect appellee's property or place any lien or cloud thereon.

In order to determine this question, it is necessary to set before your Honors those provisions of the Constitution of the State and the act of 1903 applicable thereto.

The Constitution of Tennessee (Art. II, Section 28), among other things, provides that—

"All property, real, personal, and mixed, shall be taxed, but the Legislature may except such as may be held by the State, by counties, cities or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational, and shall exempt $1,000 worth of personal property in the hands of each taxpayer and the direct product of the soil in the hands of the producer and his immediate vendee. All property shall be taxed at its value, to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State."

The assessment act of 1903, among other things, provides:

"SEC. 1. That all property, real, personal and mixed, shall be assessed for taxation for State, county and municipal purposes, except such as is declared exempt in the next section.

"SEC. 2. That the property herein enumerated, and none other, shall be exempt from taxation:

"

. . . . . .

"(2) All property belonging to any religious, charitable, scientific or educational institution, when used exclusively for the purposes for which said institution was created, or is unimproved and yields no income. All property belonging to such institution used in secular business and competing with a like business that pays taxes to the State, shall be taxed on its whole or partial value, as the same may be used in competition with secular business."

The remaining subsections of Section 2 are not applicable to the questions involved in this case.

Section 5, subsection 1, provides that all property subject to taxation shall be taxed to the persons owning or claiming to own the same on the 10th day of January of each year.

Subsection 5 of Section 5, under which the bill (Rec., p. 14) charges that the assessments sought to be made against the lessees in the proceedings before appellant Osborne, Trustee of Franklin County, is as follows:

> "That hereafter all mineral, timber or other interests in fee, for life or for a term of years, in real estate in this State, owned separate from the general freehold, shall be assessed to the owner thereof separate from the other interests in such real estate, which other interests shall be assessed to the owner thereof, all of which shall be assessed as real estate."

By Section 32 of said act, as shown in the bill (Rec., pp. 13, 14), it was, among other things, provided that all taxes under said act "shall be a lien upon the fee in said property and not merely upon the interest of the person to whom said property is or ought to be assessed . . . and the whole proceedings for the collection of taxes, from the assessment to sale for delinquency, shall be a proceeding *in rem*," etc.

So, as charged in the bill, provision is made for the assessment, separate from the general freehold, of interests in real estate for life or for a term of years, and it is insisted that because, by Section 32 of said act, it is provided that taxes upon real estate "shall be a lien upon the fee" in the property assessed, although the fee in the property owned by appellee University is unquestionably exempt from taxation, a cloud may be placed upon appellee's title by the assessment proceedings sought to be enjoined in this cause.

We submit that such result could as readily be claimed and insisted upon because of the provision of the Constitution of Tennessee that all property shall be taxed, which is given legislative expression in the first section of said assessment act, as shown above.

We submit, further, that although the interests of the lessees in and to their leasehold estates and the improvements thereon are taxable as real estate, as above provided for (subsection 5 of Section 5), nevertheless, it is manifest from the entire act that it was not intended by Section 32 to declare a lien upon a fee, either in possession or in remainder, which is exempt under the laws of Tennessee; otherwise no effect could be given to the exemptions unquestionably provided and declared by Section 2 of

said act. In other words, the provision contained in Section 32, that all taxes on real estate shall be a lien upon the fee in said property, must be construed to mean that such taxes shall be a lien upon the fee in property which is not exempt. This construction harmonizes and gives effect to all parts of said act, and sustains the same as a valid enactment.

It is a familiar canon of construction applicable to statutes that the words thereof will be either enlarged or restricted in meaning so as to carry out the manifest intention of the Legislature, and that the intention of the Legislature being ascertained with reasonable certainty, words may be supplied in the statute so as to give it effect and avoid any repugnancy or any inconsistency with such intention.

Lewis' Sutherland Stat. Const., Secs. 381, 382.

Further, as said in Gold v. Fite, 2 Baxt. (Tenn.), 248, 249: "A thing within the intention of the makers of a statute is as much within the statute as if it were within the letter."

The construction given above to the provisions of Section 32 of the assessment act of 1903 places it in harmony with the Constitution of the State and of the United States, and it is a familiar canon of construction of statutes that they must be so construed,

when it can be done without violence to the evident intent of the Legislature, so as to avoid any conflict with the Constitution of the State or of the United States; and that every intendment, when the statute has been formally enacted, must be made in favor of its validity, and that where it is subject to two constructions that must be given it which will sustain rather than that which will defeat it.

Standard Oil Co. v. State, 117 Tenn., 618, 640, 641.

Further, in ascertaining the intention of the Legislature, it will not be presumed that the lawmakers intended to pass an act in conflict with the organic law.

Maxey v. Powers, 117 Tenn., 403;
Wise & Co. v. Morgan, 101 Tenn., 282;
Rose v. Wortham, 95 Tenn., 508.

Further, it is to be borne in mind that statutes passed with due form and ceremony, as was the act of 1903, when tried for the constitutionality, as said act is, are entitled to the benefit of every reasonable doubt.

Cole Mfg. Co. v. Falls, 90 Tenn., 466;
Railroad v. Harris, 90 Tenn., 688;
Henley v. State, 98 Tenn., 666.

Further, the Constitution of Tennessee is a law of the State within the meaning of the Federal Consti-

tution (Bier v. McGehee, 148 U. S., 137), invoked by appellee, and we ask what part of the act of 1903 shows that it was the intention of the Legislature to disregard that mandate of the State Constitution forbidding it to make a law impairing the obligations of appellee's contract? No such intention can be presumed, and we insist there is no provision of the act from which it can be reasonably inferred that the lawmakers intended to violate the provisions of the State Constitution, which must be read into every act, or disregard the plain mandate of the Federal Constitution.

The decision of the Supreme Court of Tennessee that appellee's property is exempt from taxation has the force of a law of the State, and will be treated as a part of the statute affecting said property.

It is insisted by appellee that because its charter exemption and rights thereunder were not expressly named in subsection 2 of Section 2 of the act of 1903, enumerating numerous exemptions from taxation, the Legislature intended that appellee's property should be taxed under the provisions of said act.

It is true that appellee's charter exemption is not expressly enumerated along with other property exempt from taxation. It will be conceded—if not, it can be shown by probably an hundred published acts of the General Assembly of Tennessee granting,

under the Constitution of 1834, exemptions to railroads, turnpike companies, educational institutions and even banks, and by every assessment act passed since the Constitution of 1870—that it has never been deemed necessary to enumerate by name among the classes of property declared exempt by said assessment acts, the many exemptions which had been validly created by legislative acts under the Constitution of 1834—nor was it necessary to so enumerate them, because every assessment act, in its application to any particular property, must be construed *in pari materia* with other legislative acts affecting the same property and under the rules of interpretation above referred to, that construction in every doubtful case must be given which will sustain the act and harmonize it with the Constitution.

Further, we submit that the decision of the Supreme Court of Tennessee that the property of appellant is exempt from taxation under the Constitution of the State must be read into and considered as a part of the provisions of Section 32 in the same manner as though it were expressly provided that the provisions of said Section 32 should not apply to this property, because, under the act of 1858, conferring said exemption, as construed by the fundamental law of the State, said property must be treated as, and is, exempt. This adjudication of the Supreme Court of Tennessee that appellee's prop-

erty is exempt from taxation must be construed as a "rule of property" governing and controlling its relations to the State and her various agencies.

Therefore, considering the act of 1858, creating the exemption, and the solemn declarations of the Supreme Court of the State of Tennessee, construing it, as a part of any statute of the State of Tennessee in relation to appellee's property, will this court say that appellee's contract either is impaired or may be impaired by these laws of Tennessee which, under her Constitution, declare that the property in question is not subject to taxation to appellee so long as it is owned by it?

Further, in this connection, it is proper to submit to your Honors that it is not sufficient to give this court jurisdiction upon the grounds claimed, that by possibility there may be some cloud cast upon appellee's title by some possible action of the officers of the State, because the presumption in all cases is that the courts of the State and the officers thereof will do what the Constitution and laws of the United States require.

Shreveport v. Cole, 120 U. S., 36;
Neal v. Delaware, 103 U. S., 370.

But,

The property of appellee is expressly exempt from taxation by the provisions of Section 2, subsection 2, of the act of 1903; and it is immaterial whether immunity from taxation be accorded appellee under its charter or the exemptions enumerated in said act.

The exemption is contained in the following provision:

"All property belonging to any religious, charitable, scientific or educational institution, when used exclusively for the purpose for which said institution was created, or is unimproved and yields no income. All property belonging to such institution used in secular business and competing with a like business that pays taxes to the State, shall be taxed on its whole or partial value in proportion as the same may be used in competition with secular business."

Now, it was averred in the bill, and is admitted, that the rentals derived by appellee — that is, the ground rents accruing from the several leases referred to in the bill—are used exclusively by appellee for the purposes for which it was created; so that the property of appellee comes within the express provisions of the exemption provided by said Section 2, subsection 2.

But it is charged in the bill (Rec., p. 14) that the last sentence of said subsection 2, referring to property used "in secular business and competing with a like business that pays taxes," excludes appellee from the benefit of said exemption.

This precise question was before the Supreme Court of Tennessee at its December term, 1905, in the case of *Vanderbilt University v. Cheney, Comptroller of the city of Nashville,* 116 *Tenn.,* 259, wherein it was held, construing an identical provision contained in the assessment act of 1899, Chapter 435, Section 2, subsection 2, that Vanderbilt University, by renting certain property owned by it to various parties for residential purposes and devoting the income therefrom to the purposes and needs for which it was created, did not thereby become subject to assessment for taxes on said property, for the reason that such use of said property did not amount to a use thereof "in secular business" within the meaning of said statute, providing that property belonging to educational institutions and used "in secular business and competing with a like business that pays taxes" to the State, shall be taxed.

It will be noted that Vanderbilt University was an educational institution, incorporated under the general laws of the State and had no charter containing an express exemption from taxation, but the Supreme Court held that, under the authority conferred upon it by the Constitution, the Legislature had lawfully exempted its property from taxation by providing, in substance, that all property belonging to an educational institution, when used exclusively for the purposes for which said institution was created, shall be exempt from taxation.

In this case the Supreme Court of Tennessee referred to and approved its holding in the case of the University of the South v. Skidmore in the following terms:

"In University of the South v. Skidmore, 87 Tenn., 158, it was held that a charter exemption of realty under the Constitution of 1834 'from taxation so long as said lands belonged to' an incorporated institution of learning, remains in force so long as title remains in the corporation. It does not depend upon the use made of the property. It was, therefore, held that the University did not so far renounce title as to defeat the exemption by giving leases thereof for terms of years with renewal options to divers persons who built up a village thereon, the annual rent being reserved and devoted exclusively to the purposes of the University."

So we have an express adjudication of the Supreme Court of Tennessee, not only as to the effect of the provisions of Section 2, subsection 2, but approving, more than two years after the passage of the act of 1903, its holding in the Skidmore case.

Therefore, it being manifest that appellee's property, in so far as it is concerned, is expressly covered within the exemptions enumerated by Section 2 of the act of 1903, it can not be contended that the provisions of Section 32 have any application whatsoever to it. The provisions of this section fixing the lien of taxes upon the whole estate and all interests therein, and not merely upon the interest of the party to

whom the property might be or should be assessed, first found legislative expression in Tennessee in the assessment act of 1897, from which they are taken *verbatim;* and it is well known—it will certainly be conceded at the bar by adversary counsel—that such provisions were intended to change or remedy the holding of the Supreme Court of Tennessee (Nashville v. Cowan, 10 Lea, 209; Coldwell v. Crumley, 35 S. W. Rep., 765; Anderson v. Post, 38 S. W. Rep., 283; State v. Campbell, 41 S. W. Rep., 937; Ferguson v. Quinn, 96 Tenn., 36) that the lien of taxes assessed against a life tenant as "the owner," in the meaning of the tax laws, rested only upon the interest of the life tenant and not upon the remainder interest in the property, and that the lien of taxes was not superior to the vendor's lien or the lien of a mortgage.

Dunn v. Dunn, 99 Tenn., 606, 607.

Such was the purpose of the Legislature—it was never intended by these provisions to render taxable property which was exempt, or to place, by indirection, a lien upon property which the statute expressly recognized as exempt from taxation.

But there is a failure of jurisdiction for another reason, based upon the holding of the lower court:

The Circuit Court held that the Act of 1903, so far as it affects appellee, is in violation of the Constitution of the State of Tennessee; therefore, does it not necessarily follow that

the State has not enacted or "passed" this act into a law, within the meaning of the provision of the Federal Constitution forbidding states to pass laws impairing the obligations of contracts? (Rec., p. 42.)

We cannot assent to the interpretation placed by the lower court upon the act of 1903, but respectfully insist that said act, when properly construed, does not in any way affect the property of appellee. However, the lower court held that the necessary effect of said act is to impair appellee's charter exemption, and if this be true, we concede that the act is void, as held by the court, because expressly forbidden by the Constitution of the State; but is not the necessary effect of such holding to eliminate the supposed Federal question from this case? Does it not inevitably follow that the State has not *enacted into a law* the matter complained of by appellee, within the meaning of the Federal Constitution forbidding States *to pass laws* impairing the obligations of contracts? We submit that something more than passing a bill with due form and ceremony is necessary to enact it into a law. If the matter of a bill, though so passed, is in contravention of the Constitution of the State, that is, if the Constitution of a State forbids the Legislature to do the thing sought by the bill, compliance with form and ceremony as to the passage does not enact — "pass" — it into a law of the State. Such a bill, even after compliance with the forms and manner of passage, has no sanc-

tion or recognition by the State—it is not a law of the State.

We have been unable to find that this precise question has been passed upon by this court, but we believe the principle is sound and has been recognized in analogous cases. We refer:

(1) To that class of cases too well known and recognized to make it necessary to cite them here, wherein State officials, acting under a supposed law of a State, have invoked the protection of the 11th amendment to the Federal Constitution and claimed immunity from suit because acting for and by the authority of a State, but wherever it has been found that the alleged law under claim of which such officials were acting was in contravention of the Constitution of the State, it has been adjudged that the acts of such officials were not done by authority of the State, or any law of the State.

(2) In the American system, municipal corporations—governmental agencies—derive their powers from the people of a State acting through their Legislature; and authority to exercise any particular power by a municipality must be found within the legislative enactment creating or conferring powers upon such municipality. And it is well settled that when an ordinance or by-law is adopted by a municipality, under and within the power and authority

conferred upon it by the Legislature, such ordinance or by-law is a law of the State within the meaning of the Federal Constitution forbidding States to pass laws impairing the obligations of contracts, or make or enforce laws abridging the privileges or immunities of citizens of the United States.

But wherever the jurisdiction of a Federal court has been invoked upon the ground that an ordinance of a municipality impairs the obligations of a contract, it has been, so far as we are advised, uniformly held that if such ordinance has not been authorized by the people of the State acting through their Legislature, it is not a law of the State, and therefore a Federal court is without jurisdiction to hear and determine the questions made upon it.

Gas Co. v. Hamilton, 146 U. S., 258.

Is there any difference in principle between an ordinance not authorized by the people of a State through their Legislature and an act of a Legislature which the people of a State by their Constitution forbid the Legislature to enact into a law?

But the learned judge who presided in the lower court, while holding that the act of 1903 had not been enacted by the State of Tennessee in compliance with her own Constitution, and was therefore void, nevertheless maintained jurisdiction upon the ground, as it appears in his opinion (Rec., pp. 40, 42), that

the officials of the county of Franklin and State of Tennessee were, by prosecuting the suits against appellee's lessees before the Trustee and the Trustee by entertaining jurisdiction of said suits, impairing appellee's charter exemption, and rested his holding in this respect upon the cases of C. B. & Q. Ry. Co. v. Chicago, 166 U. S., 226, and Ohio v. Thomas, 173 U. S., 276.

We respectfully insist that the learned judge erred in the view taken by him of the action of these officials, because they could not—as we construe the act of 1903—place a lien upon the property of appellee, and moreover, said officials (Rec., pp. 28-31) expressly admit appellee's exemption from taxation, as determined by the Supreme Court in the Skidmore case, *supra,* and deny that it is their intention or purpose to in any way assess appellee's property or place any lien thereon or attempt to sell the same for the taxes sought to be assessed against the lessees.

Further, we respectfully insist that the cases cited by the learned trial judge, *supra,* are clearly distinguishable from the case at bar and do not sustain his holding, because:

(1) The case of C. B. & Q. Ry. Co. v. Chicago, *supra,* was brought to this court upon writ of error to the judgment of the Supreme Court of Illinois—the court of final resort of that State—which had, in

effect, sustained the statute of that State or judicial proceedings complained of as a valid and constitutional law of Illinois; whereas, the court below expressly held that the act of 1903 was in conflict with the Constitution of the State, that is, the State had not passed it into a valid enactment;

(2) In Ohio v. Thomas, 173 U. S., 276, an entirely different question from that presented in the case at bar was before your Honors, and as we understand it, your Honors only held in that case that a Federal officer, such as the governor of a soldiers' home, created and supported under Federal laws, in discharging his duties in a State and engaged in superintending the internal government and management of a Federal institution under the lawful direction of its board of managers and with the approval of Congress, is not subject to the jurisdiction of a State in regard to those very matters of administration which are approved, as stated, by Federal authority.

For these reasons, we respectfully submit that when the lower court found the act in question to be forbidden by the Constitution of the State, the Federal question upon which jurisdiction was sought to be predicated was eliminated, and the bill should have been dismissed.

II.

A Federal court is without power to enjoin the proceedings pending before the Trustee of Franklin County, a special court or tribunal of the State having sole jurisdiction and power in the first instance under the laws of said State to determine questions involved in the assessment and valuation for taxation of property omitted from the assessment rolls.

Under the provisions of the act of 1903 (printed in the appendix to this brief), the Trustee of each county in the State is vested with judicial powers and sits as a court of first instance in the matter of the assessment for taxation of property omitted from the assessment rolls, and from his holding in any particular case an appeal lies either by the State or county seeking an assessment, or by the party whose property is affected thereby, to the State Board of Equalization. Both of these tribunals or courts have been held to be quasi courts of record of the State of Tennessee.

By Section 720 of the Revised Statutes of the United States it is provided:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The proceedings sought to be enjoined are in no sense summary, or without notice, but are, to all intents and purposes and in legal effect, *suits* on behalf

of the State of Tennessee and county of Franklin, through the State's duly authorized Revenue Agent, before a special tribunal or court clothed with judicial functions, against persons who were cited, after due notice to appear before said court, from the judgment of which if dissatisfied therewith, they were entitled to an appeal to the State Board of Equalization, an appellate court having jurisdiction to determine questions involved.

It is to be observed that the lessees against whom the proceedings were instituted, after due notice had been served upon them as required by the statute, appeared by their counsel, and in the case of Mrs. Hoeffer final judgment was rendered.

Rec. pp. 11-12.

We have here all that is essential to constitute a court —parties plaintiff and defendant, a matter in controversy, and a tribunal clothed with judicial functions and power to determine the questions involved.

As stated by Chief Justice Turney, in Tomlinson's Case, 88 Tenn., 17-21, these special tribunals are clothed with power to try matters of law and fact—they are inferior courts authorized by Article 6, Section 1, of the Constitution of the State.

It is true that the opinion of Judge Turney in the Tomlinson case was delivered in dissent from the result

reached by a majority of the court, which, however, did not differ from his holding in respect of the character of these special tribunals, but merely went to the extent of holding that certiorari in lieu of an appeal did not lie, under the statutes then in force, to review the holding of a county board of equalization, where no appeal was expressly given.

It is proper, however, here to note that this holding upon the question of certiorari has since been reviewed by the Supreme Court of Tennessee, and virtually overruled. And it is now held that circuit courts have general power and revisory jurisdiction over all inferior tribunals created by the Legislature and vested with judicial powers which it may exercise by certiorari and supersedeas, where no appeal or writ of error will lie for the correction of their judgments.

Further, the opinion of Judge Turney in respect of the character of these special courts has been practically adopted by the Supreme Court in adjudicating questions arising upon the act of 1903.

Briscoe v. McMillan, 117 Tenn., 115, 131, 132;
State v. Taylor (Tenn.), 104 S. W. Rep., 246.

There is no difference between the powers and functions of the Trustee and those of the State Board of Equalization, save that the Trustee acts in the first instance and the State Board of Equalization only by appeal from him. Therefore, in respect of the char-

acter of such tribunals or courts, we call the attention of your Honors to the language of the Supreme Court of Tennessee in Briscoe v. McMillin, *supra:*

"We fully agree with the contention made on behalf of the State that by the provisions of this act (Acts of 1903, Chapter 258), the said Board (referring to the State Board of Equalization) is constituted a quasi court of record, and that its findings, in the exercise of the jurisdiction conferred upon it, have the force and effect of judicial determinations, and cannot be collaterally attacked."

In State v. Taylor, *supra*, virtually the same holding was made in respect of the functions and powers of the Trustee.

Further, as we understand the decisions, it has been uniformly held by this court that wherever proceedings are sought to be enforced before a tribunal exercising the judicial power of the State, they are to be considered as proceedings of a court of the State which cannot be restrained by an injunction issuing out of a Circuit Court of the United States, because, to issue such an injunction would be in direct contravention of the peremptory enactment of Congress that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any

court of a State, except where authorized by the bankruptcy act.

Diggs v. Wolcott, 4 Cranch, 179;
Peck v. Jenness, 7 How., 612-625;
Watson v. Jones, 13 Wall., 679-719;
Haynes v. Carpenter, 91 U. S., 254-257;
Dail v. Reynolds, 96 U. S., 340;
Sargent v. Hilton. 115 U. S., 348.

In Haynes v. Carpenter, *supra*, this court, speaking through Mr. Justice Bradley, said:

"In the first place, the great object of the suit is to enjoin and stop the litigation in the State courts and to bring all the litigated questions before the Circuit Courts. This is one of the things which the Federal courts are expressly prohibited from doing; by the act of March 2, 1793, it was declared that a writ of injunction shall not be issued to stay proceedings in a State court. This prohibition is repeated in Section 720 of the Revised Statutes, and extends to all cases, except where otherwise provided by the bankruptcy law."

III.

The property rights of the several lessees of appellee in and to their respective leasehold estates and the improvements erected thereon under their several leases are lawfully subject to taxation by the State and county of Franklin.

We have seen that it is the policy of the State of Tennessee, as expressed both in her Constitution and statutes, to tax all property within her borders except such as she has expressly exempted from taxation;

that such exemption is recognized by the State of Tennessee and county of Franklin, and that any intention to assess said property or place any lien or cloud upon the title of appellee to said property has been expressly disclaimed, and that no proceedings has been instituted by which it has been sought in any way to tax any interest of appellee in its exempt property.

Further, it is to be observed that appellee in its bill (Rec., pp. 13-14) admits that provision has been made for assessing as realty such leasehold interests as are owned by the lessees of appellee separate from the fee in such property.

It is immaterial whether the interests of said lessees in the property in question would be real estate or personalty at common law, because the Legislature has unquestioned power for purposes of taxation to classify property without regard to the common law distinctions—that is, it may provide that real estate shall be assessed as personalty or that personalty shall be taxed as realty.

Cooley on Taxation (3 ed.), p. 641.

If this question were made, we would only need to refer to the Code of Tennessee (Shannon), section 63, wherein among other things, it is provided that, "'Real estate,' 'real property,' 'lands,' include lands, tenements and hereditaments, and all rights thereto and interest therein, equitable as well as legal."

The effect of this provision was to change the common law rule that a leasehold estate is personal property.

Alley & Bush v. Lanier, 1 Cold., 540;
Burr v. Graves, 4 Lea, 556.

The word "owner of land," as used in the statutes of Tennessee, does not necessarily mean the person owning the entire estate in such property, but may mean any person having an interest therein, whether in fee or for a term of years, as has been adjudicated by the Supreme Court of Tennessee in Alley & Bush v. Lanier, *supra*, wherein it was held, under a statute giving a mechanic a lien upon land wherever a house has been built or repaired by contract with the *owner*, that the word "owner" means a person owning a *term* as well as a *fee*, and sustained a lien in favor of a mechanic upon the leasehold estate and improvements thereon owned by a tenant for years.

Judge Cooley, in his work on Taxation (3rd edition), pp. 633-634, says: "Where land is owned by one person and buildings thereon by another, the two are assessed separately, and the assessment of the buildings as real estate is proper. It is also proper to thus assess the buildings *when the land is exempt from taxation;*" citing People v. Brooklyn Assessors, 93 N. Y., 308; Russell v. New Haven, 51 Conn., 259; Brainard v. Colchester, 31 Conn., 407; Lord v. Litchfield, 36 Conn., 116; People v. Tax Commissioners, 80 N.

Y., 573; Union Compress Co. v. State, 64 Ark., 136; Milligan v. Drury, 130 Mass., 426.

Now, let us apply the principle of these cases to the *property and interest of the lessees*, as shown in this record, because it is the interests of said lessees and not any interest of appellee that is sought to be taxed. The leases provide that said lessees shall have their separate parcels of land for periods ranging from three to thirty-three years, upon payment of a mere ground rent and a covenant said that lessees shall pay "*all taxes and assessments upon said premises.*" It is further provided that at the expiration of the terms created by each of such leases appellee can only take over the premises and improvements thereon by paying for all of the improvements made thereon or by renewing the leases for another term on such terms as may be agreed upon by the parties respectively.

Under these provisions, to whom do the improvements belong? Unquestionably to the lessee; because appellee cannot become the owner of said improvements except upon payment of the value thereof. The plain implication from this is that unless said improvements are paid for by appellee, the lessee thereof might lawfully remove them. True, it is not so expressly stipulated, but nothing less than this right could have been meant by the plain provisions of the lease.

Rec. pp. 139-140.

It is true the leases do not expressly stipulate that in case a renewal is made upon the expiration of the term, the appellee must pay for the improvements at the expiration of such renewal term, but it is provided that the lease may be renewed "on such terms as may be agreed upon by the parties respectively," and while that contingency has not yet arisen, can it be supposed and can this lawsuit be predicated upon the assumption that the lessees would agree to a renewal upon terms any less advantageous than those providing for payment at the expiration of the first term? If there is any presumption whatsoever about this matter, it is that the parties would act or do that thing which would be for their interests.

Further, it is to be borne in mind that, by the express terms of the leases, the value of the improvements cannot be taken into account as against the lessee in fixing the rental for any renewal term.

Rec. pp. 139-140.

In Russell v. City of New Haven, 51 Conn., 259., it was held that a lessee erecting improvements on lands leased from Trinity Church—which lands were exempt—was liable for taxes on such improvements. The lease contained a provision that at the end of the term the lessor should pay for the improvements a

sum to be fixed by appraisers. This case is directly in point. To the same effect are the holdings in

Philadelphia, etc., R. R. v. Appeal Tax Court, 50 Md., 397;

Zumstein v. Consolidated Coal Co., 50 Ohio, 264;

Bently v. Barton, 4 Ohio St., 410.

In Parker v. Redfield, 10 Conn., 490, it was held that the interest of a lessee in improvements erected by him on property leased from Trinity Church was taxable, and that such improvements were clearly distinguishable from the lands themselves, which were exempt. The terms of the lease involved in this case were substantially the same as are provided in appellee's leases, and it was held that the improvements, if not paid for at the termination of the lease, might be removed by the lessee, although there was no express provision to that effect.

In People v. Board of Assessors, 93 N. Y., 308-311, was involved the taxability of certain leaseholds or improvements thereon leased from the Brooklyn Benevolent Society. The facts were, in brief, as follows: The Brooklyn Benevolent Society leased certain of its lands which were exempt from taxation to it to certain persons with covenants of renewal, reserving the privilege at the expiration of any term to assume possession by paying the lessees the appraised value of the buildings erected by them upon the premises. As stated,

the real estate of said society was, under its charter, exempt from taxation, and it was insisted on behalf of the lessees that the benefit of such exemption extended to the estate and interest owned by them in said property, but the Court of Appeals of New York, approving Van Ness v. Commissioners, 80 N. Y., 573, held that the interests of said lessees in said property was subject to taxation, and in so holding it is interesting to note that the court, among other things, said:

"We have, therefore, arrived at the conclusion that the interest of the relators (lessees) in the property assessed does not come within the letter of the statute exempting the property of the Brooklyn Benevolent Society from taxation. We think they are very far from coming within the spirit and meaning, and if necessary should feel constrained to give a rigorous construction to the act to prevent its escape from those burdens of taxation which become less onerous according to the equality with which they are distributed over the community at large."

Further, upon the construction and effect to be given to the leases in this case, we also refer your Honors to the following part of the opinion of the New York Court of Appeals in said case of People v. Board of Assessors, *supra*:

"We conceive also that the insertion in a lease of a clause giving a tenant the right to remove erections made by him at the expiration of his term presents no legal distinction between such a contract and one where the lessor, by the terms of the lease, can acquire ownership of such erections only by paying

therefor. In such case, the right of removal is implied by law upon noncompliance by the lessor with the conditions of the lease. In one case the right is expressly secured and in the other it follows as a necessary implication from the conditions of the contract."

But it was insisted in the court below that the case of People v. Board of Assessors, *supra*, had been, in effect, overruled by the decision of the New York Court of Appeals in the case of People ex rel. v. Barker, 153 N. Y., 100. An examination of the opinion in that case shows that a very different case was presented from that disclosed in People v. Board of Assessors, and that the lease under which the improvements were erected provided in express terms that said "*improvements should become the property of the party of the first part* (that is, of the city of New York) *on the expiration* or sooner determination *of this lease* or any renewal thereof, *free from all claims, charges and incumbrances of every kind whatsoever*," etc.; so, it is manifest that the improvements erected by the lessees involved in People v. Barker became, when attached to the freehold, at once the property of the lessor, and that the lessees had no sort of separate interest therein.

In Exparte Gaines, 96 Ark., 227, the Supreme Court of Arkansas held that the improvements erected by certain lessees upon property belonging to the United States, was nevertheless taxable to the lessees separate from the freehold.

In San Francisco v. McGinn, 67 Cal., 110, it was held as follows:

"The city and county of San Francisco in 1875, under the act of March 30, 1875, leased to defendant a portion of the school lot belonging to the city and county, located at the corner of Market and Fifth streets. Defendant took possession of the leased land and made improvements thereon and erected a substantial four-story frame building with brick foundation attached to the soil. For the fiscal year 1881–1882 the building and improvements were assessed to defendant, and this suit is to recover the taxes. Defendant insists that he is not liable for the taxes, because he says (1) the city and county own the realty—the improvements and buildings are portions of the realty, and therefore not his property; and (2) Section 3887 of the Political Code, as in force at the date of the lease, 'declared that the lessor of real estate is liable for the taxes thereon,' and that the city and county, being liable, cannot recover of him. . . . . Section 3607 of the Political Code, as in force in 1875, declared the property of municipal corporations was not subject to taxation. *If, as contended, the building and improvements were portions of the realty and thus exempt, the provision of the Constitution of* 1863, *as to uniformity of taxation, might be evaded.*

"We are of the opinion that, for the purposes of revenue, the defendant was the owner of the property assessed, and that he is liable for the taxes."

The case of State v. Campbell, 23 La. Ann., 445, was relied upon by appellee in the court below, but that case is clearly distinguishable from the case at bar, because the decision therein was rested upon a statute altogether different from the one involved

here; moreover, the Supreme Court of Louisiana, in a later case—Lee v. New Orleans, 28 La. Ann., 426—has held that the interest and property rights of lessees in exempt property are subject to taxation.

It is well settled that the public domain of the Federal government is not subject to taxation, but the improvements on such domain, whether owned by the preemptioner or one occupying public lands without license, are liable to assessment for taxation, if made so by the revenue laws of a State.

People v. Shearer, 30 Cal., 645, 656, 657.

In State v. Moore, 12 Cal., 56, 69-70, it was held that a mining claim upon the property of the United States, exempt from taxation under an act admitting California into the Union, is property and subject to taxation by the State.

In State v. Tucker, 38 Nebraska 56, 59-60, it was held that improvements placed by individuals upon the public domain—even when the land may revert to the Federal government—are subject to taxation, and that there is a marked distinction between the power to tax improvements and the power to tax the land itself.

However, we do not need to cite the decisions of States other than Tennessee for authority to tax the property interests and improvements made by the lessees upon property admitted to be exempt as to appellee.

In the case of *Luttrell v. Knox County, 89 Tenn., 257*, it was expressly decided by the Supreme Court of Tennessee that the superstructure erected by a lessee on certain bridge piers owned by the county of Knox and therefore exempt from taxation, were during the continuance of the lease subject to taxation under the laws of the State of Tennessee as the property of the lessee or his assignee.

Whether the property in the Luttrell case was assessed as personalty or realty does not appear from the opinion of the court, nor is that material to the questions involved here as we understand them; but here we are reminded that in the lower court it was insisted by the learned counsel for appellee that there is a distinction between improvements on government property and those upon lands exempt by contract or statute. We confess that we are utterly unable to perceive any such distinction, or that, upon principle, there should be any such distinction. It is immaterial whether the property cannot be taxed because it belongs to the goverment or whether the owner is an individual or corporation, and it has been declared exempt by a valid statute—the effect is the same—it is exempt from taxation.

Further, on the trial of this cause in the lower court, it was insisted on behalf of appellee that it was determined in the case of East Tennessee, etc., Railway Co. v. Morristown, 35 S. W. Rep., 771, decided in

1895 by the Court of Chancery Appeals (an inferior tribunal), and which was affirmed by the Supreme Court in an oral opinion, but upon what grounds it does not appear, that in the absence of a contract in respect of taxes a leasehold estate should be assessed to the lessor as the owner of the property, citing Turley v. Memphis, 8 Heisk., 845, decided in 1872, as authority for that proposition. However, without regard to the ground upon which the opinion of the Court of Chancery Appeals may have been affirmed, it does not aid appellee's contention, for the reason (1) that the leases involved in this case provide for payment of taxes by the lessees, and (2) because the assessment act of 1889, referred to by the learned judge of the Court of Chancery Appeals in his opinion, does not contain the several provisions of the act of 1903, under which the bill insists that the interests of the lessees are sought to be taxed in this case.

Further, the Court of Chancery Appeals, in its opinion just referred to, expressly held that the right of removal as to buildings and structures that might be erected upon the leased property secured to the lessee in the instrument of lease, prevented such buildings and structures from becoming technically improvements upon the real estate, and that the value of the same was assessable to the lessee as personalty.

This holding, as above stated, was under the act of 1889, which did not contain the provisions of subsec-

tion 5 of section 5 of the act of 1903, but it is immaterial to appellants whether the property rights of appellee's lessees be assessed as personalty or realty, and that question is not before this court—the question here being whether or not the State has the power to levy taxes upon the property rights of the lessees, without regard to whether such property rights be considered as realty or personalty.

Further, the opinion of the Court of Chancery Appeals seems to be predicated upon the holding of the Supreme Court in Turley v. Memphis, *supra*, which was also under an entirely different statute, but it is not improper in this connection to call the attention of your Honors that while it is stated in the opinion of the court that "nothing was said in the lease about the payment of taxes," and that therefore the owners were to pay the taxes, yet the opinion also shows that the amount of the tax was evidently added into the rentals paid by the lessees, so that the taxes were, in effect, paid by the lessees, under an agreement and understanding that if the leased property, which was to be used for educational purposes, should be held exempt, they should have an abatement of the rent to the amount of taxes that would be levied in case the property were not exempt.

It was further insisted in the court below that the case of *Murray v. Charleston*, 96 *U. S.*, 440, was authority for the contention of appellee. All that was

held in that case, as we understand it, was that the city of Charleston was bound by its contract in relation to the interest which it agreed to pay on its bonds and that it could not tax or impair that interest belonging to nonresident holders of its bonds. Manifestly a different case from the one at bar.

The case of *New Jersey v. Wilson*, 7 *Cranch*, 150, was also relied upon by appellee in the lower court to sustain its contention that the lessees of its exempt property were entitled to the exemption. An examination of this case discloses that the decision of the court was arrived at solely because the State of New Jersey, through her Legislature, consented to the sale of the exempt property with all its privileges and immunities.

Therefore, we respectfully submit that the property which the lessees have in and upon their leasehold interests, by virtue of the improvements erected thereon, is property, and therefore taxable by the State of Tennessee, without in any way impairing, diminishing or affecting appellee's charter exemption.

IV.

Appellee's charter exemption is personal to it.

It is well settled that immunity from taxation is not transferable; it is a privilege personal to the grantee. Pickard v. E. T. V. & G. Ry. Co., 130 U. S., 631; State v. Mercantile Bank, 160 U. S. 161.

The intent to confer an exemption, and especially when it is insisted that the exemption passes to a transferee of the original grantee, must be clear beyond a reasonable doubt. Railroad Tax Cases, 18 Wall., 226; Providence Bank v. Billings, 4 Peters, 565.

V.

In any event, the decree of the lower court should be modified so as to restrict its effect to proceedings under the alleged unconstitutional provisions of the Act of 1903.

We, of course, do not admit that any of the provisions of the act of 1903 are unconstitutional, but even if the Circuit Court is right in its holding as to the effect of said provisions, nevertheless, its decree should have been restricted to holding that the State and county of Franklin could not lawfully assess the property of the lessees under the provisions so held by it to be in contravention of the Constitution of the State and of the United States, but the court went further than this and virtually held, as shown by its final decree and its opinion rendered on the hearing of the demurrer and the application for a preliminary injunction and made a part of the decree (Rec. pp. 190-192), that the State and county could not lawfully assess the leasehold interests of appellee's lessees for taxes—*that such interests are exempt from taxation*—and perpetually enjoined appellants from assessing or attempting to assess for taxes the interests of said

lessees for any purpose or under any statute. It is true it is not so expressly written into the decree, but such is its meaning when read along with the opinion of the court (Rec. pp. 35-42), which is made a part of the decree. Unde. the pleadings, upon the view of the case most favorable to appellee, the court was without power to do more than to restrain appellants, representing the State and county of Franklin, from attempting to assess the property in question under the alleged unconstitutional provisions of the act of 1903—leaving it open to the State, if it so desired, to remedy the alleged defects of said act. And this is done, as shown by the assessment act of 1907, the provisions of which, applicable to the questions involved here, are printed in the appendix to this brief.

As hereinbefore stated, prior to this controversy, it was never thought to be necessary to enumerate in any assessment act the hundreds of charter exemptions which have been granted by the Legislature of Tennessee—nor was it ever supposed that the provisions of the assessment act placing a lien upon the entire property would be construed as in any way affecting exempt property, as hereinbefore shown.

However, after the holding of the opinion by the learned judge who sat upon the trial of this cause in the lower court, that the provisions of the act of 1903 complained of by appellee were invalid as impairing its charter contract because said act contained no ex-

press exception as to said charter contract or enumeration of appellee's property in the exemption clause, and that under Section 32 the taxes sought to be levied upon the leasehold interests were a lien upon the property of appellee, the General Assembly, in order to avoid for the future any possibility of such contests as are at present involved in this case, expressly exempted from taxation all valid charter exemptions, and provided that the lien of the taxes should not apply or affect any fee in property where the same is exempt from taxation. In our opinion, these provisions of the act of 1907 were not necessary either to protect appellee or enable appellants to tax the property interests of appellee's lessees.

However, certain it is that the State's right to tax such property interests cannot now be subjected to the attack made by the bill in this case, and but for the injunction awarded by the decree of the lower court, proceedings might be commenced under the act of 1907 to assess for taxation the property rights of appellee's lessees.

So, we say that in any event the decree of the lower court should be modified as above stated.

It is proper to show your Honors that the enactment of the assessment act of 1907, which repealed the act of 1903, does not abate or in any way affect the proceedings instituted before the Trustee of Franklin

County under said act of 1903, because, by the Code of Tennessee (Shannon), Section 61, it is provided as follows:

"The repeal of a statute does not affect any right which accrued, any duty imposed, any penalty incurred, nor any proceedings commenced, under or by virtue of the statute repealed."

VI.

The effect of the decision of the Circuit Court.

In conclusion, we submit that, in determining whether the property rights and interests of the several lessees of appellee, as shown in this record, are taxable under the Constitution and laws of the State of Tennessee, it is proper to consider the effect of the holding of the lower court that such interests are exempt from taxation.

It is the declared policy of the State that all property shall be taxed and that the burdens of taxation shall operate equally and uniformly upon all property in the State, except where an exemption from taxation has been lawfully created. No claim is made here that any property interest of appellee can be taxed—the Constitution of the State protects its exemption to the fullest extent. But can it be conceived that the Legislature, in granting the exemption contained in appellee's charter, intended to thereby preclude the State from taxing all interests in such

property which in the course of time may pass to other persons dealing with appellee—that is, where appellee has parted with its title to a particular interest in said property, whether such interest be for a term of years or merely improvements erected upon the property?

We ask your Honors to look at conditions existing now and which in the course of time may come into existence. Upon the thousand acres exempt to appellee under its charter, there has been already built a thriving town, having a population of about 1,200 inhabitants, who have built upon the lots leased to them for terms ranging from ten to thirty-three years, valuable improvements, worth many thousands of dollars. Every building has been erected by the lessees at their own expense, for their own personal use or investment for profit. Many of the lessees have several leaseholds—some of them are nonresidents, whose only connection with the property is to take leaseholds, build improvements thereon, and rent the same for profit. Such property belongs to the lessees—it can never belong to appellee, except, as provided in the leases, by payment of the value thereof to the lessees. In the course of time, upon this reserved domain, the town of Sewanee may grow into a populous city, the buildings and improvements in which have been erected solely at the expense of the lessees of appellee, and will be owned by said lessees. Shall such property enjoy the protection of the law and at

the same time escape any part of the burdens of government distributed uniformly over the people of the State?

Further, appellee, in addition to the reservation of 1,000 acres, owns a magnificent domain of perhaps 8,000 acres, underlying which is the famous Sewanee coal vein. This property, when used solely for the purposes for which appellee was created, is exempt from taxation under the statutes of Tennessee. And under the holding of the Supreme Court of Tennessee in Vanderbilt University v. Cheney, *supra*, appellee may rent or lease this property, and for any term of years, either to individuals, firms or corporations, and so long as the rentals are devoted to the purposes for which appellee was created, *no tax can be levied against appellee.*

But what about the property interest of its lessees? Suppose appellee should by lease at a rental agreed upon permit great mines to be opened and developed upon said property at the cost of hundreds of thousands of dollars to the lessees, would not the interests of the lessees in such mines be taxable as against the lessees? Shall such property escape its due share of taxes which the Constitution requires shall be equal and uniform throughout the State? It would seem that the statement of these questions contain their answer, and that it not only cannot be contended that it appears beyond a reasonable doubt, or even that it

can reasonably be contended, that it was the intention of the Legislature that appellee's charter exemption should extend to such property rights.

For these reasons, we respectfully submit that the decree of the lower court should be reversed, and the bill dismissed.

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Attorney General of Tennessee.

FRANK L. LYNCH,
FELIX D. LYNCH,
I. G. PHILLIPS,
THOMAS B. LYTLE,
Attorneys for Appellants.

APPENDIX.

Constitutional and Statutory Provisions Referred to in the Brief.

Constitution of Tennessee among other things provides:

"That no retrospective law, or law impairing the obligations of contracts, shall be made."

(Art. 1, Sec. 20, page 47.)

Taxation, merchant, and privileges.—"All property, real, personal or mixed, shall be taxed, but the legislature may except such as may be held by the State, by counties, cities or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational, and shall except one thousand dollars' worth of personal property in the hands of each taxpayer, and the direct product of the soil in the hands of the producer, and his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the State." . . . .

(Art 2, Section 28, page 59.)

Acts of 1903, Chapter 258, among other things provides:

"*Be it enacted by the General Assembly of the State of Tennessee*, That all property, real, personal and mixed, shall be assessed, for taxation for State, county, and municipal purposes, except such as is declared exempt in the next section."

(Section 1, page 632.)

"That the property herein enumerated, and none other, shall be exempt from taxation."

(Section 2, page 632.)

"All property belonging to any religious, charitable, scientific, or educational institutions, when used exclusively for the purpose for which said institution was created, or is unimproved and yields no income. All property belonging to such institution used in secular business and competing with a like business that pays taxes to the State shall be taxed on its whole or partial value in proportion as the same may be used in competition with secular business."

(Part 2, Section 2, Chapter 258, page 632.)

"That the basis of all assessments shall be as follows, to-wit:

(1) "To assess the property to the person or persons owning or claiming to own the same on the 10th day of January of the year for which the assessment is made, if known; if not, to unknown owners."

(Section 5, Chap. 258, page 633.)

(5) "That hereafter all mineral, timber, or other interests in fee for life or for a term of years in real estate in this State owned separate from the general freehold, shall be assessed to the owner thereof separate from the other interests in such real estate which other interests shall be assessed to the owner thereof, all of which shall be assessed as real estate."

(Section 5, Chap. 258, page 634.)

"That any property or properties included in this Act shall be back, or reassessed for the period now provided by law, viz:

(1) "When the same have been omitted from or escaped taxation." . . . . . .

(Subsections 2, 3, 4 and 5 are not material.)

(6) "Whenever it is within his knowledge or he has reason to suspect in his county that any property has, in violation of this Act, as above prescribed been assessed by any assessor, or computed by any Board of Equalizers at less than its actual cash value, it shall become the duty of any revenue agent, of any District Attorney, of any attorney of the county, of the Judge or Chairman of the County Court, of the County Court Clerk, of any Circuit, Chancery, and Criminal Court Clerk, of any Sheriff, and of any citizen of the county, to cause or have the County Court Clerk, in the case of merchants' taxes, and the County Trustee, in case of other taxes covered by this Act, to have issued the citation hereinafter set out, for the purpose of back or reassessing such property. At the request of or upon the information or motion of any citizen or taxpayer of the State, or of any of the officers above named, it shall be the duty of the County Court Clerk, in the case of merchants' taxes, and the County Trustee, in the case of other taxes covered by this Act, to issue, for the purpose of back or reassessing property, the citation hereafter set out. The County Court Clerk, in the case of merchants' taxes, and the County Trustee, in the case of other taxes covered by this Act, to issue, for the purpose of back or reassessing property, the citation hereafter set out. The County Court Clerk, in the case of merchants' taxes, and the County Trustee, in the case of other taxes covered by this Act, upon the motion or information, or at the request of any citizen or taxpayer of the State, or of any of the officials before designated, or when the same is within the knowledge of, or suspected by the County Court Clerk, or County Trustee, shall issue as to any property assessed or valued in violation of this Act, at less than the actual cash value of the same, a citation to be served by any officer of the county or of any district thereof, upon the owner of the property, or his agent, or representative, or attorney, summoning him to appear before such Clerk or County Trustee, at his office giving not less than five days' notice from the date of the issuance of the citation and show cause, if any, why said property should not be back or reassessed at its actual cash value.

The form of citation shall be substantially as follows, viz:

State of Tennessee.....County,

To..... at..... Tenn.

Proper motion having been made before me by..... State Revenue Agent for the State of Tennessee under Section..... ..... Chapter..... . of the Acts of Tennessee, 190..... .

You are hereby cited to appear before me..... .....Trustee or County Court Clerk for..... .....County, Tennessee, at my office in the courthouse in.... ..... Tennessee, on the.....day of..... .....1903, at.....o'clock.....M., for the purpose of being assessed or reassessed for the years .... .. upon omitted or inadequately assessed property in the said county and State, and show cause, if any, why said property should not be back or reassessed at its actual cash value.

Trustee or County Court Clerk.....County, Tenn.

Issued at office this.....day of.. . .....190.... .

The officials herein named as having power to back or reassess property, are vested with full authority to administer oaths, send for and examine witnesses, and take such steps as may be deemed necessary or material to obtain information and evidence as to the value of the property. Said witnesses, when properly summoned, shall be amenable to existing laws for non-attendance or failure to give evidence which is in their knowledge.

Said officials herein vested with the power to back or reassess property shall have full authority, in proceedings, to back or reassess such property, to make proper, correct and adequate assessments of the same at its actual cash value, which, when entered upon the tax books or filed in writing with the authorized

tax-collecting authority, shall become a final and valid assessment of the property, and collectible as such, as fully and amply as if originally entered upon the assessment rolls."

(Section 31, Chapter 258, pages 661, 662.)

"That the assessed taxes on all real estate, personalty, railroad, telegraph and telephone companies, and all damages and costs accruing thereon, shall be and remain a first lien upon such property from the 10th of January of each and every year for the taxes of that year; and said taxes shall be a lien upon the fee in said property, and *not* merely upon the interest of the person to whom said property is, or ought to be assessed, but to any and all other interests in said property, whether in reversion or remainder, or of lienors, or of any nature whatever, and the whole proceeding for collection of taxes from the assessment to sale for delinquency shall be a proceeding in rem, and shall not be invalid on account of such land having been listed or assessed for taxation to any one as owner or owners, or to any person or persons, not the owner or owners, or to unknown owner or owners."

(Section 32, Chapter 258, page 663.)

"That the Secretary of State, Treasurer, and Comptroller of the Treasury of the State, and their successors in office, are hereby created a State Board of Equalization and invested with the powers and required to perform the duties hereinafter prescribed, viz.:

. . . . . .

(Section 38, Chapter 258, page 671.)

(11) "Said State Board of Equalization shall also hear appeals upon matters of back or reassessments made by revenue agents or other officers of the State from County Trustees or County Court Clerks. The right of appeal from the decision of said Trustees or County Court Clerks in the matter of back or reassessments is hereby given to the State and county or party

assessed or reassessed; provided, said appeal is prosecuted within ten days from the date of such back or reassessment or attempt to back or reassess, and the said Trustee or County Court Clerk shall, upon such appeal being perfected, certify his action to the State Board of Equalizers, whose duty it shall be to hear the matter in controversy within ten days from the filing with them, or either of them, the notice of appeal, provided said board is then in session."

(Section 38, Chapter 258, page 674.)

Acts of 1907, Chapter 602, among other things, provides:

(1) "*Be it enacted by the General Assembly of the State of Tennessee*, That all property—real, personal and mixed—shall be assessed for taxation for the State, county and municipal purposes, except such as is declared exempt in the next section."

(2) "*Be it further enacted*, That the property herein enumerated, and none other, shall be exempt from taxation." . . .

. . . . . .

(2) "All property belonging to any religious, charitable, scientific or educational institutions, when used exclusively for the purpose for which said institution was created, or is unimproved and yields no income. All property belonging to such institution used in secular business and competing with a like business that pays taxes to the State shall be taxed on its whole or partial value in proportion as the same may be used in competition with secular business."

. . . . . .

(7) "All property protected by valid charter or contract exemption."

(Section 2, Chapter 602, page 2047.)

"*Be it further enacted*, That the basis of all assessments shall be as follows—to wit:

"To assess the property to the person or persons owning or claiming to own the same on the 10th day of January of the year for which the assessment is made, if known; if not, to unknown owners."

(Section 5, Chapter 602, page 2048.)

"That hereafter all mineral and timber interests and all other interests of whatsoever kind or character, whether for life or a term of years, in real estate, including the interest which the lessee may have in and to the improvements erected upon land where the fee, reversion or remainder therein is exempt to the owner, and which said interest or interests is or are owned separate from the general freehold, shall be assessed to the owner thereof separately from the other interests in such real estate, which other interest shall be assessed to the owner thereof, all of which shall be assessed as real estate."

(Section 5, Part 5, Chapter 602, page 2049.)

"*Be it further enacted*, That the assessed taxes on all real estate personalty, railroad, telegraph and telephone companies, and all damages and costs accruing thereon shall be and remain a first lien upon such property from the tenth of January of each and every year for the taxes of that year; and said taxes shall be a lien upon the fee in said property, and not merely upon the interest of the person to whom said property is or ought to be assessed, but to any and all other interests in said property, whether in reversion or remainder or of lienors, or of any nature whatever, and the whole proceeding for collection of taxes from the assessment to sale of delinquent shall be a proceeding *in rem*, and shall not be invalid on account of such land having been listed or assessed for taxation to any one as owner or owners or to any person or persons not the owner or owners

or to unknown owner or owners; *Provided, however*, That where there is assessable under this act a leasehold interest in real estate or any improvements on real estate, which said real estate is exempt from taxation in the hands of and to the owner thereof, the taxes assessed against such leasehold interest or interest in improvements on such exempt real estate shall be a lien only upon such leasehold interest or interest in improvements, and not upon the interest of the owner of the fee or the remainder or reversion of the fee."

(Section 31, Chapter 602, pages 2082 and 2083.)

NOTE—The other provisions of the Acts of 1907 are not materially different from those of the Acts of 1903 where they bear upon the questions involved in this case.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 482.

James R. Jetton,

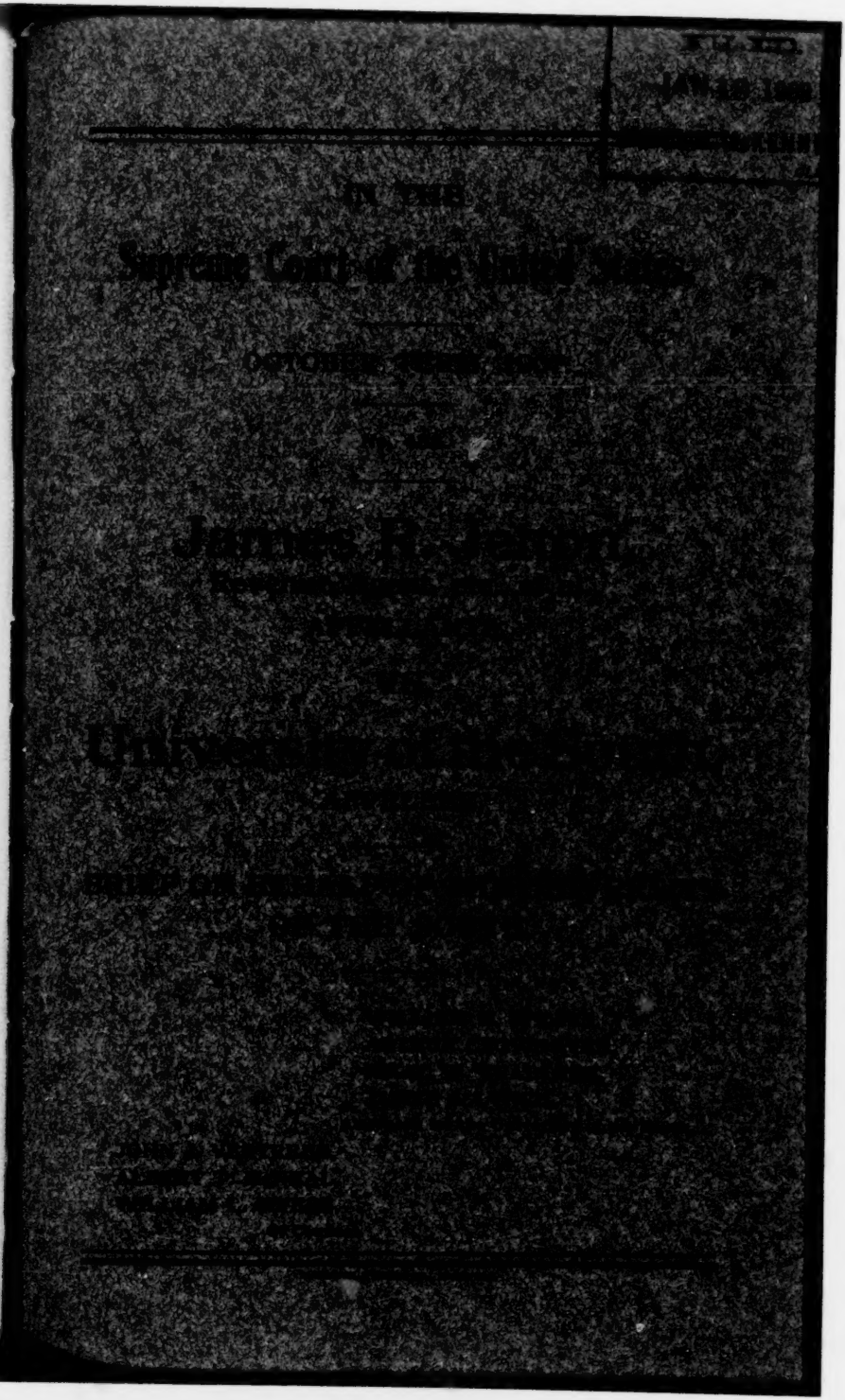
APPELLANT,

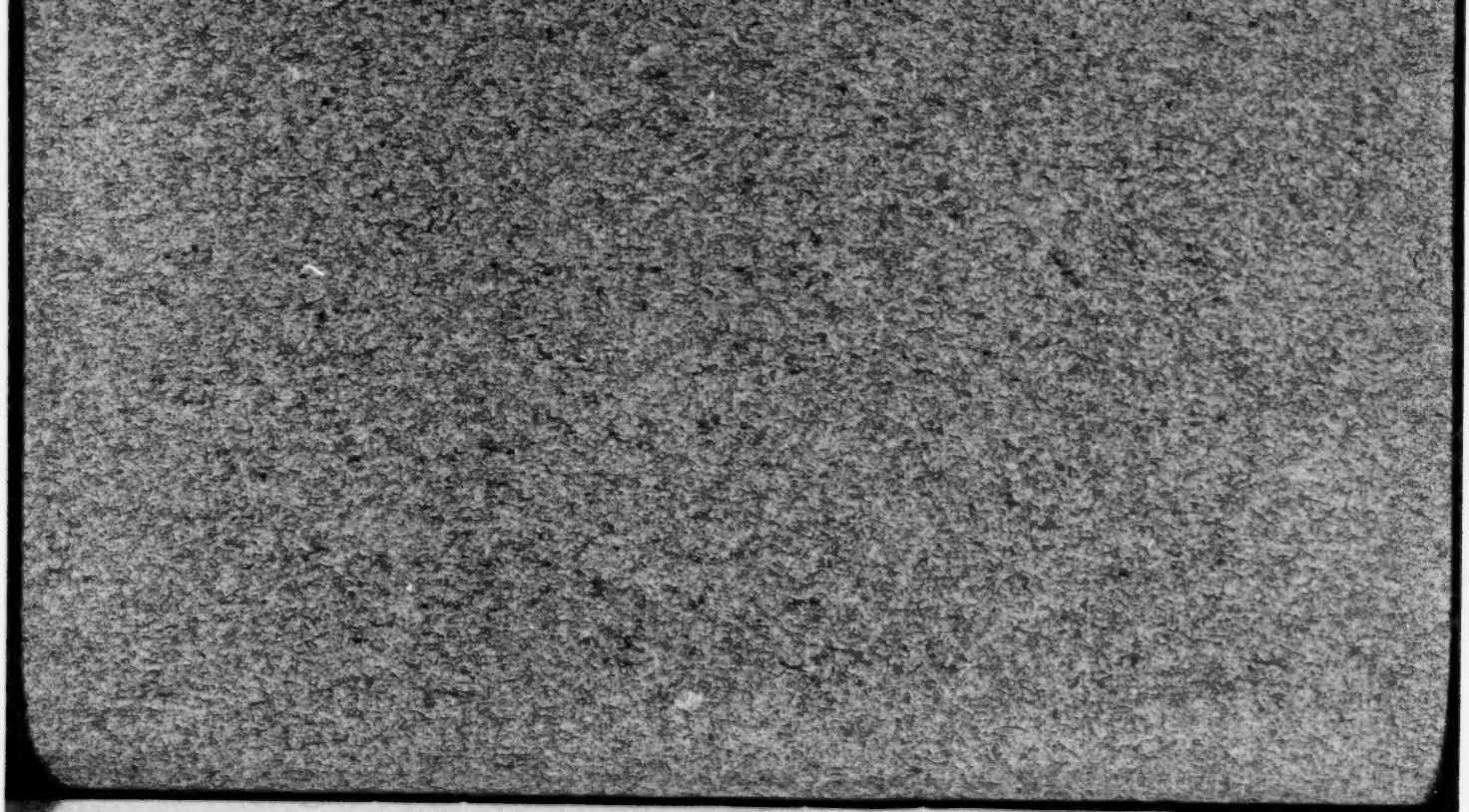
vs.

University of the South,

APPELLEE.

BRIEF ON BEHALF OF THE UNIVERSITY OF THE SOUTH.





IN THE

Supreme Court of the United States.

OCTOBER TERM, 1907.

JAMES R. JETTON, Revenue Agent, etc., et al,
Appellants,

vs. } No. 488.

THE UNIVERSITY OF THE SOUTH,
Appellee.

BRIEF ON BEHALF OF THE APPELLEE.

May it please the Court:

This cause was brought to this Court by the appellants on appeal from a decree of the United States Circuit Court for the Middle District of Tennessee, in favor of the appellee, the University of the South. The appellants have appealed to this Court under the authority of the 5th section of the Act of March 3, 1891, creating the Circuit Court of Appeals, by which act jurisdiction is conferred upon this Court to review, by direct appeal, any final judgment rendered in the Circuit Court "in any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

The suit was instituted by the University of the South to protect its lessees and tenants from an attempt to illegally assess them with taxes.

The complainant insisted that the property was exempt from taxation under the University's charter, granted by the State, and that the Assessment Act, under which appellants were proceeding to assess this property, was void, because it impaired the obligation of the charter referred to, which was in derogation of Section 10, Article I, of the Constitution of the United States; and because such assessment was without notice to the University, and violated the due process clause of the fourteenth amendment to the Constitution.

A correct statement of the case can best be had by a brief review of the pleadings.

THE COMPLAINANT'S BILL.

The bill was originally filed on behalf of the University of the South and several of its lessees, against James R. Jetton, Revenue Agent for the State of Tennessee, the County of Franklin, and D. S. Osborne, Trustee for Franklin County.

The bill charged that the University of the South was organized and chartered by an Act of the General Assembly of the State of Tennessee, passed January 6, 1858, a copy of which charter is hereto appended, together with a copy of an amendment passed by the General Assembly of Tennessee, on January 19th, 1860.

The bill set forth the circumstances under which this charter was granted, as follows:

> "On July 1st, 1856, Rt. Rev. Leonidas Polk, a Bishop of the Protestant Episcopal Church, set forth in a letter to his church associates of the dioceses or States of Tennessee, Georgia, Alabama, Arkansas, Texas, Mississippi, Florida, South Carolina and North Carolina, the idea and conception of this University.

"On the 23d of October, 1856, all of the Bishops of the dioceses and States above named united in a circular letter on the subject, addressed to the members and friends of the church in these States. As a result of these efforts, representatives from the ten States mentioned met on Lookout Mountin, near Chattanooga, Tennessee, on July 4th, 1857, to take action in the matter of establishing a great university in the South. While this organized action was taken by representative Episcopal churchmen of these Southern States, the movement was not sectional in a political sense, nor sectarian in a religious sense. At the same time, the scheme required of necessity united and harmonious action, so the effort to establish this university was made under the auspices and control of the Protestant Episcopal Church. The enterprise was one in which the people of these ten States generally were very much interested, one in which the public, regardless of denominational feeling, felt and exhibited great interest. There was a great deal of competition and rivalry as to the site of the proposed university, and many inducements offered by various localities in Alabama, Mississippi, Tennessee, Georgia and the Carolinas. The citizens of these various localities made strenuous efforts to secure the location of the university, but it was decided finally to locate the same at Sewanee, in Franklin County, Tennessee, provided a proper charter could be obtained from the State of Tennessee.

"This decision to locate the University at Sewanee was reached by a committee appointed at said Lookout Mountain meeting.

"At the time, there was no village at Sewanee, not even a station house. It was a wilderness on the top of the plateau of the Cumberland Mountains, removed from any city or town. The land was cheap, at that time being used for no other purpose. It seemed best to the committee representing the originators of this institution that they should endeavor to locate the same so that it would be removed altogether from the dangers and temp-

tations of town or city life. To consummate this plan, it was necessary for the University to own its own domain and the surrounding territory, to the end that no evil influences or objectionable people or institutions could establish themselves near the University. In other words, in order to carry out this scheme of isolation, and have a University that could be kept removed from all objectionable influences and associations, which seemed so desirable to the founders of this institution, it was necessary for the University to have sufficient property at and around the University that its managers and trustees would be able to say who should and who should not be located thereon, and what should and what should not be built thereon; so that the University might be developed and maintained free from all adverse influences, and create its own environment, and bring into being and gather around it all the complicated relations and necessary factors in its existence and for its successful development—not only school buildings and houses of professors and of the officers of the University—boarding houses, shops of tailors, shoemakers, grocers, shopkeepers of all kinds, laborers' houses, etc., were necessary factors for the erection and maintenance of the University.

"All of these things were considered by the founders of the University, and by the committee selected to secure a location for same, and also by the committee selected to secure a charter from the State of Tennessee, it having been decided, as aforesaid, that the University should be located at Sewanee, if a proper and satisfactory charter could be obtained from the State.

"This committee selected to draft the charter had for its chairman Mr. Francis B. Fogg, an eminent lawyer of the Nashville bar. The charter was prepared by this committee, submitted to the association for its approval, and, on the 6th day of January, 1858, it was granted by the Legislature of the State of Tennessee, as hereinbefore set out.

"Immediately after the grant of its corporation powers, the University of the South was regularly organized at a regular meeting of its trustees, and said charter and corporate rights were accepted in regular form.

"Upon the faith of said charter and powers and rights therein granted, large donations were made to the University of the South, and it acquired title to a large body of mountain land at Sewanee, Tennessee: and, in November, 1861, had surveyed out and laid off one thousand acres, which was then and thereafter known as the University Reservation, which, under Section 10 of this charter, it had a right to own and hold free from taxation."

It will be noticed that Section 10 of the charter reads as follows:

"*Be it further enacted,* That said University may hold and possess as much land as may be necessary for the buildings, and to such extent as may be sufficient to protect said institution and the students thereof from the intrusion of evil-minded persons who may settle near said institution, said land, however, not to exceed ten thousand acres, one thousand of which, including buildings and other effects and property of said corporation, shall be exempt from taxation as long as said lands belong to said University."

This exemption from taxation was respected by the State and county until the year 1887, when the officers of the State and county attempted to assess and back assess the University of the South for taxes on this one thousand acres and all improvements thereon.

The University filed an original bill in the Chancery Court of Franklin County, against A. J. Skidmore, who was at that time the Trustee of Franklin County, to enjoin him from assessing and back-assessing said property. Franklin County filed a cross-bill in said cause, seeking to enforce the right of said county to assess and back-assess said property, insisting that a large part of said property had been leased out by the Uni-

versity, and that by so doing the University had lost its right of exemption from taxation. The cause was heard before the Chancellor, and he decreed that all of said leased property, except that occupied by the professors and officers of the University, was subject to taxation. On appeal, this decree was reversed by the Supreme Court of Tennessee, which Court held that the University was not subject to taxation on this property. The Court held that the charter of the University was a valid contract between the State of Tennessee and said University, under and by the terms of which the University had a right to immunity from taxation as long as the legal title to this one thousand acres remained in it. The Court further held that the leasing out of the property was not a waiver of this right. The opinion of the Supreme Court in said cause is reported in 87 Tenn., 155.

Thereafter, neither the University nor its tenants were called upon to pay any taxes on this property to the State and county until August, 1906, when Appellant Jetton, State Revenue Agent for the Middle Division of Tennessee, caused to be issued by the appellant, Osborne, who was the Trustee of Franklin County, notices to all persons occupying said one thousand acres of land as lessees or tenants from the appellee, University of the South. Said notices were to the effect that, on the 13th day of August, 1906, the said Trustee of Franklin County would assess and back-assess said tenants and lessees for the years 1903, 1904, 1905 and 1906. The bill set out the list of tenants and lessees holding under the University of the South, and alleged that the premises occupied by them under their leases were all covered by the one thousand acres held by the University under Section 10 of its charter.

On the 13th day of August, 1906, said lessees appeared before said Trustee, by their attorneys, and insisted that said property was exempt under the charter of the University. This claim for exemption, however, was disregarded by the Trustee, and the property of one of the lessees, Mrs. Hoeffer, was assessed and back-assessed for the years mentioned. The bill set out the assessment, which was prepared and signed by D. S. Osborne, Trustee. The property was assessed as the "lease-

hold interest in lot and buildings thereon." The boundaries are also set out in the assessment.

The Trustee, in his assessment, recited:

> "Said property is subject to assessment and back-assessment by virtue of the Acts of 1903, Chapter 258, of the General Assembly of Tennessee."

Said Trustee continued the other cases against the lessees until September 10th, 1906, and announced that, under the same facts, he would assess and back-assess the other lessees in like manner.

The eighth section of the bill sets out the various features of the general assessment law passed by the General Assembly of Tennessee on April 9th, 1903, and published in the Acts of that year, Chapter 258, Section 1 of which provides:

> "That all property, real, personal and mixed, shall be assessed for taxation for State, county and municipal purposes, except such as are declared exempt in the second section of the act."

The second section provides:

> "The property herein enumerated, and no other, shall be exempt from taxation."

The property enumerated consists of the property of the general government, State, counties and municipalities of the State.

The act also exempts:

> "All property belonging to any religious, charitable, scientific or educational institutions, when used exclusively for the purpose for which said institution was created, or is unimproved and yielding no income. All property belonging to such institutions used in secular business, and competing with like business that pays taxes to the State, shall

be taxed on its whole or partial value, in proportion as the same may be used in competition with secular business."

No provision is made in this act for the protection of property exempted by charters of corporations and educational institutions such as the complainant University.

The bill set out Subsection 5 of Section 5 of the act as follows:

> "That, hereafter, all mineral, timber or other interests in fee, for life, *or for a term of years,* in real estate in this State, owned separate from the general freehold, shall be assessed to the owner thereof separate from the other interests in such real estate, which other interests shall be assessed to the owner thereof; all of which shall be assessed as real estate."

Section 32 is also set out, as follows:

> "That the assessed taxes on all real estate, personalty, railroad, telegraph and telephone companies, and all damages or costs accruing thereon, shall be and remain a first lien upon such property from the 10th of January of each and every year for the taxes of that year; and said taxes shall be a lien upon the fee in said property, and not merely upon the interest of the person to whom said property is or ought to be assessed, but to any and all other interests in said property, whether in reversion or remainder, or of leinors, or of any nature whatever, and the whole proceedings for the collection of taxes from the assessment to sale for delinquency shall be a proceeding *in rem,* and shall not be invalid on account of such land having been listed or assessed for taxation to any one as owner or owners, or to any person or persons not the owner or owners, or to unknown owner or owners."

The act also contains a provision for the back-assessment of omitted or inadequately assessed property, for penalties for nonpayment of taxes, and for the sale of the property of delinquent property owners.

The bill charged that this act changed the existing rule as to the taxation of leasehold estates; that, by the terms of Subsection 5 of section 5 of the act hereinbefore set out, the lessee was made liable directly for taxes; whereas, at the time the charter was granted, the University, and at all times prior to the passage of the Act of 1903, the owner of the fee alone was assessable for taxes.

On this point the bill charged:

> "At the time the charter was granted, the University was liable for taxes on every interest in the property. The State contracted to exempt this property of the University from taxation. This exemption, under the law as it existed at that time, applied as well to leasehold interests as to any other interest in the property; it included the whole property."

And again:

> "It is now insisted that the State has a right to impair the obligation of this charter contract and all rights and contracts growing out of the same, by simply passing this act requiring the property to be assessed to the lessees."

Sections 10, 11 and 12 of the bill are as follows:

> "10. As before shown, the University of the South derives an important part of its necessary revenue by which it is maintained, from rents received from its co-complainant lessees. While, as before shown, the taxes complained of in this bill have been assessed, and will be assessed against the lessees, it is none the less taxation against the University of the South, because it is a tax on the rental value of the property, and will necessarily decrease the amount of rents received from the lessees. The fact that this property was exempt from State and county taxation was taken into consideration in fixing the amount of rent to be paid to the University at the time these leases were executed; and as these leases are all renewed, and as new leases are executed, it will be impossible for the Univer-

sity to collect the same amount of rental, as it otherwise could, because the amount of taxes to be paid would necessarily be taken into consideration and be deducted from the amount of rents which the lessees would otherwise be able and willing to pay. In this way, this whole tax will be a direct burden on the University of the South, and will greatly impair, if not practically destroy, the revenue it would otherwise receive from this property; and it would impair and absolutely destroy the force and effect of its charter exemption, so far as this leased property is concerned. The lessees are merely the agencies through whom these officers are seeking to tax this property of the University.

"11. Complainants charge that the Act of the General Assembly of 1903, hereinbefore referred to, as construed and enforced by the officials of the State of Tennessee, impairs and practically nullifies the contract betwen the University of the South and the State of Tennessee, as set forth in Section 10 of the charter of said University, as hereinbefore recited; and this is in derogation of Section 10, Article I, of the Constitution of the United States, prohibiting any State from passing any law impairing an obligation of a contract.

"12. Complainants charge that this Act of 1903, providing that taxes assessed against the lessee shall become a lien on the title of the owner of the property without any notice or process to the owner, has been sustained as a valid law by the Supreme Court of Tennessee, and that by and under the terms of the act, as construed and enforced by the Courts and officials of the State of Tennessee, it is provided that the exemption contract between the State of Tennessee and the University of the South shall not only be nullified, but that the property of the University of the South shall be sold for taxes assessed against its tenants without notice or any process whatever as to the University of the South, and without giving said University any chance to be heard, and without providing any remedy whatever to said University of the South. Com-

plainants, therefore, charge that this act violates the Fourteenth Amendment to the Constitution of the United States, in that it provides for the taking of property of the University of the South without due process of law, and because it denies to all of said complainants the equal protection of the laws."

The bill further charged that there was no remedy at law whatever for the University, and that there was no adequate remedy for any of the lessees.

It is charged that the amount involved was more than two thousand ($2,000) dollars, and that the taxes for the years for which they were attempting to back-assess the property would amount to more than fourteen thousand ($14,000) dollars.

The bill further charged that no decree protecting its charter exemption could be had in a State court, because, under the rules of the Supreme Court of that State, no adjudication of a tax case has any binding effect except as to the year's taxes actually involved in the litigation.

The Circuit Court was asked to assume jurisdiction and issue an injunction restraining the attempt to assess these lessees, because neither the University nor the lessees had any adequate remedy at law, and because it was necessary to prevent a multiplicity of suits, and to prevent a cloud from being cast upon the University's title.

Rec., pp. 1-19.

DEMURRER.

The demurrer raised the following questions:

1. That the Court had no jurisdiction, because the complainants and defendants were citizens of the same State, and that it was not shown in the bill that the complainants had any rights under the laws or Constitution of the United States that had been violated.

2. Because the Court had no jurisdiction as to the lessees.

3. Because the tax proceeding was, in effect, a suit in the State Court which could not be enjoined by the Circuit Court.

4. Because complainant's bill was, in effect, a suit against the State.

5. Because the bill did not state a case giving a court of equity jurisdiction.

6. Because there was a complete remedy at law.

7. Because no taxes were sought to be assessed against the University of the South.

The 8th, 9th and 10th causes of demurrer went to that part of the bill making the lessees complainants.

Rec., pp. 23 and 24.

The demurrer was sustained as to the lessees, and overruled as to the University of the South.

Rec., pp. 35 to 43, inclusive.

THE ANSWER.

The defendants answered the bill, making the same defenses as set out in the demurrer. They disclaimed any intention of assessing taxes against the University, or creating any lien on the *title* of the University. The defendants insisted, however, that all of the improvements put on the leased property belonged to the lessees, and were taxable by the State and county.

The defendants also insisted that the charter of the University did not exempt its lessees from taxation, and that defendants had a right under the Assessment Act of 1903, to assess said improvements for taxation, and also to assess the value of the leasehold estates.

Rec., pp. 25 34.

Proof was taken by the complainants, and every allegation made in the bill amply sustained. Upon final hearing, the injunction was made perpetual and full relief given the University against any attempt to assess it or its lessees.

Rec., pp. 191, 192.

ARGUMENT FOR UNIVERSITY OF THE SOUTH.

In presenting this case we will follow the line adopted by counsel for appellants in their brief, and discuss, first, the question of jurisdiction, and then the merits of the controversy.

THE FEDERAL QUESTION.

In beginning their argument, counsel for appellants say: "We submit *that no Federal question was made by the bill.*"

If counsel are correct in this, then *this Court has no jurisdiction of the appeal.* By the Act of March 3, 1891, creating the Court of Civil Appeals and defining their jurisdiction, it is provided that an appeal may be had to this Court directly from a Circuit Court "in any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

This statute was construed by this Court in the case of *Penn Mutual Life Ins. Co.* v. *City of Austin*, 168 U. S., 686, where it was held that the right of a direct appeal to this Court existed "whenever it is claimed on the record that a law of a State is in contravention of the Federal Constitution. Of course, the claim must be real and colorable, not fictitious and fraudulent."

The Court further say:

> "The contention here made, however, is not that the bill, without color of right, alleges that a State law and city ordinances violate the Constitution of the United States, but that such claim as alleged in the bill is legally

> unsound. The argument, then, in effect, is that the right to a direct appeal to this Court does not exist where it is claimed that a State law violates the Constitution of the United States, unless the claim is well founded. *But it can not be decided whether the claim is meritorious and should be maintained without taking jurisdiction of the case.*"

For the same reason it has been frequently held by this Court that when the bill on its face charges, in good faith, that the law of a State violates some right of the complainant, in violation of some provision of the Federal Constitution, then the Circuit Court has jurisdiction, whether the claim be well founded or not; because the Court can not decide whether the claim be well founded until it assumes jurisdiction to try that question.

In the case of *Louisville Trust Company* v. *Stone,* 107 Fed., 305, a bill was filed in the Circuit Court to enjoin the board of valuation and assessment of the State of Kentucky from assessing the property of the complainant at more than 70 per cent of its value, alleging that the defendant, by its proposed method of assessment, denied to the complainant equal protection of the laws as guaranteed by the Fourteenth Amendment to the Federal Constitution.

It was held that the complainant had not sustained its alllegation with reference to the discrimination charged, and the denial of the equal protection of the laws. The Court held, however, that the complainant was entitled to some relief on other grounds. Mr. Justice Day, speaking for the Court, said:

> "Notwithstanding the failure of complainant to establish its right to relief upon the ground of Federal jurisdiction, alleging the unjust discrimination against it in assessing its property, at its full value, while other property in the State was assessed at 70 per cent of its value, thus depriving complainant of the equal protection of the laws under the Fourteenth Amendment, the jurisdiction of the Court having been invoked for that purpose, the

bill may be retained to administer full relief concerning the assessment upon the property of the complainant based upon the ownership of said shares of stock in the Mattingly Company. If the claim to relief clearly within the Federal jurisdiction, is fair and colorable, not fictitious and fraudulent, jurisdiction attaches, although the ultimate decision may be against the right claimed. *Penn Mutual Life Ins. Co.* v. *City of Austin*, 168 U. S., 695. When the jurisdiction has properly attached it extends to the whole cause, and all the issues involved, whether of a Federal or non-Federal character, and the Court has power to decide upon all questions involved."

And again:

"The federal jurisdiction having been properly invoked, we may examine into the other questions made in the case, notwithstanding as to them there may be a remedy in the State Court."

In the case of *Ill. Cent. R. R. Co.* v. *Adams*, 180 U. S., 28, the bill was filed in the Circuit Court by the complainant railroad company to enjoin the State railroad commission from approving and certifying the assessment for taxes against the Canton, Aberdeen & Nashville Railroad, and to also enjoin the Revenue Agent from beginning any other suits, or advising the bringing of such suits against said company for the collection of taxes. It was insisted that the Circuit Court had no jurisdiction.

The bill in the case alleged that said railroad company was exempt from taxation under its charter, and that this exemption had been repeatedly recognized by the State, and sustained by the Supreme Court of the State; that the property had been leased to the complainant, Illinois Central Railroad, and that it, the complainant, was in possession of the property.

The bill further averred that the defendants, *"claiming to act under the laws of said State,* passed subsequent to the charter and its acceptance, are endeavoring and will illegally impair and destroy the obligation of said charter contract as aforesaid,

unless restrained by your honors; . . . . and that they are also attempting and claim that they have succeeded in fastening upon said railroad a first and paramount lien under the Acts of said State passed in 1892 and 1894, and acts done by them in 1898, which displaces and is paramount to the lien to secure said mortgage bond."

Mr. Justice Brown, speaking for the Court, said:

> "The bill clearly avers a case arising under the Constitution of the United States, and is one of which the Circuit Court would have jurisdiction, irrespective of the citizenship of the parties. As we had occasion to observe in *City Railway Co.* v. *Citizens' Street Railway Co.*, 166 U. S., 557, 'Whether the State had or had not impaired the obligation of this contract was not a question which could properly be passed upon or a motion to dismiss, *so long as the complainant claimed in its bill* that it had that effect, and such claim was apparently made in good faith, and was not a frivolous one.' "

In the case just quoted from, *City Railway Co.* v. *Citizens' Street Railroad Co.*, 166 U. S., 558, the bill was filed in the Circuit Court alleging that the complainant had a contract with the city of Indianapolis, which gave it the exclusive right to operate its railway in that city. It was alleged that the Legislature of the State of Indiana afterwards passed a law applicable to all cities of the State of a certain class, authorizing said cities to grant franchises for the street railways and other public utilities. It was alleged that, under the color of this legislative authority, the city of Indianapolis did subsequently pass an ordinance granting certain rights to another street railway company, which violated complainant's rights under its contract with the city. It was insisted that the Federal Court had no jurisdiction. As to this, the Court say:

> "There can be no doubt that the Circuit Court had jurisdiction of the case, notwithstanding the fact that both parties are corporations and citizens of the State of Indiana. It should be borne in mind in this connection that *juris-*

diction depended upon the allegation of the bill, and not upon the facts as they subsequently turned out to be."

And again:

"All that is necessary to establish the jurisdiction of the Court is to show that the complainant had, *or claimed in good faith to have,* a contract with the city which the latter had attempted to impair."

And again:

"That the city did attempt to impair this contract by the agreement of April 24th, 1893, with the City Railway Company, and its ordinance ratifying the same, is equally clear. This contract was entered into *in pursuance of a supposed right* given by the Act of the General Assembly of March 9th, 1891, known as the city charter, the 59th section of which enacted that 'the board of public works shall have power . . . to authorize and to empower by contract, telephone, telegraph, electric light, gas, water, steam, or street car, or railroad companies to use any street, alley, or other public place in such city; . . . provided, that such company contracts shall, in all cases, be submitted by said board to the council of such city, and approved by them by ordinance before the same shall take effect.' This contract and ordinance of April 24th, 1893, even if otherwise valid, *could not be construed to interfere with the rights of the complainant to occupy the streets of the city under the Act of 1861, and the ordinance of January 18th, 1864, without coming in conflict with the provision of the Constitution which forbids States from enacting laws impairing the obligations of contracts.* Whether the State had or had not impaired the obligation of this contract was not a question which could be properly passed upon, on a motion to dismiss, so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith, and was not a frivolous one."

In the case of *Bank of Kentucky* v. *Stone,* 88 Fed., 383, decided by the Circuit Court of Appeals for the Sixth Circuit,

the bill was filed by the complainant against the board of valuation and assessment of the State of Kentucky. The bill charged that, under its charter, it had the right to pay certain taxes and none other; but that the defendants, acting under the general assessment law of the State of Kentucky, were seeking to assess the complainant in violation of this charter contract.

Judge Taft, speaking for the Court, said:

> "The bill attacks the validity of the Kentucky revenue law of November 1892, and seeks relief against its enforcement on the ground that in its application to the complainant bank, it violates the clause of the Federal Constitution which forbids a State to pass a law impairing the obligation of a contract. The case is, therefore, one arising under the Constitution of the United States, and as it involves more than two thousand dollars, it is within the jurisdiction of this Court."

In the case of *Union and Planters' Bank of Memphis* v. *City of Memphis,* 111 Fed., 561, the complainant filed a bill in the United States Circuit Court, charging that its charter provided that it should pay an annual tax of one-half of one per cent on each share of its stock, which should be in lieu of all other taxes. The bill also charged that the city of Memphis was seeking to assess its capital stock for city taxes under the general assessment acts of the State, passed in 1897 and 1899.

Judge Lurton, speaking for the Court of Appeals, said:

> "The demurrers which go to the jurisdiction of the Court are not well founded. The jurisdiction does not depend upon the diversity of citizenship, for that does not exist, but upon the federal question arising out of the alleged violation of the obligation of the contract, contained in the charter of the complainant corporation. The bill attacks the constitutionality of the revenue laws of 1897 and 1899, so far as they authorize the imposition of a tax upon a capital stock of the Union and Planters' Bank, as laws impairing the obligation of the charter exemption."

While sustaining the jurisdiction of the Court, it was held that complainant was not entitled to relief, because the act complained of did not, in fact, violate the obligation of complainant's charter.

In the case of *Knoxville Water Co.* v. *City of Knoxville,* 200 U. S., 22, the complainant filed a bill in the Circuit Court seeking to restrain the city of Knoxville from erecting and operating a water power plant, to supply the inhabitants of the city with water. It was alleged that complainant had been given, by the city, an exclusive right to supply the city and its inhabitants with water, and that after the execution of this contract the General Assembly of the State of Tennessee had passed an act authorizing the city to establish a plant of its own, and that, pursuant to the authority thus conferred, the city had passed the necessary ordinance, and was proceeding to establish or purchase a plant of it own.

The Circuit Court dismissed the bill upon demurrer. The case was appealed to this Court. It was insisted that the Court was without jurisdiction.

Mr. Justice Harlan, speaking for the Court, said:

> "Upon the question of the jurisdiction of the Circuit Court to take cognizance of this case, without regard to the citizenship of the parties, but little need to be said. The water company, as we have seen, insists that the agreement of 1882 constituted a contract whereby it acquired, for a given period, an exclusive right, by means of pipes laid in the public ways, and the system of works established for that purpose, to supply water for the use of the city and its inhabitants. It also insisted, as just stated, that the obligation of this contract will be impaired if the city, proceeding under the Acts of the Legislature, and under the ordinance in question, establishes and maintains an independent separate system of waterworks in competition with this water company. *This question having been aptly raised by the company's bill, the case is plainly one arising under the Constitution of the United States.*"

Nevertheless, it was held that the contract set out in the bill was not exclusive, and that the complainant was entitled to no relief.

Adversary counsel cite the case of *Hamilton Gas Light & Coke Co.* v. *City of Hamilton,* 146 U. S., 258. This case presents very much the same question as the case just cited.

Delivering the opinion of the Court, Mr. Justice Harlan said:

> "The plaintiff's first contention is, that there is no statute of Ohio authorizing any city in which there are already gas works in full and complete operation to erect gas works, or to levy a tax for that purpose. If this were conceded, we should feel obliged—the plaintiff and defendant both being corporations of Ohio—to reverse the judgment and remand the cause with directions to dismiss the suit for want of jurisdiction in the Circuit Court. The jurisdiction of that Court can be sustained only upon the theory that the suit is one arising under the Constitution of the United States. But the suit would not be of that character, if regarded as one in which the plaintiff merely sought protection against the violation of the alleged contract by an ordinance to which the State has not in any form given, *or attempted to give, the force of law.* A municipal ordinance, not passed under *supposed legislative authority,* can not be regarded as a law of the State within the meaning of the constitutional prohibition against State laws impairing the obligations of contracts."

And again:

> "We sustain the jurisdiction of the Circuit Court because it appears that the defendant grounded its right to enact the ordinance in question, and to maintain and erect gas works of its own, upon that section of the municipal code of Ohio adopted in 1869 (now Section 2486 of the Revised Statutes), providing that the city council of any city of village should have power, whenever it was deemed expedient, and for the public good, to erect gas works at the expense of the corporation, or to purchase gas works

> already erected therein; which section, the plaintiff contends, *if construed as conferring the authority claimed,* impaired the obligation of its contract previously made with the State and the city."

This case clearly shows that the averments in the bill in the case at bar state a case giving the Circuit Court jurisdiction.

Of course, if the taxing officers were proceeding *without any color of legislative authority,* to assess the complainant's property in violation of its charter exemption, this fact would not give the federal court jurisdiction. But complainant's bill distinctly avers that the assessment is attempted to be made by virtue of the power conferred by Chapter 258 of the Asessment Act of 1903, specifically setting out the provisions of this act under which the officers are attempting to assess the property. The assessment itself made by the Trustee recites that it was made by authority of Chapter 258 of the Acts of 1903.

The Attorney General for the State is here insisting, in his brief, that this act, and especially Subsection 5 of Section 5 of the act, expressly confers the right to tax the leasehold interests in this property.

We think it is conclusively settled, by the repeated decisions of this Court, that a federal question arises whenever a contract right is destroyed or impaired by the action of the officers of the State acting under some legislative enactment of the State, or, as stated in the case just cited, when the action is taken *under color of authority* from the legislature of the State.

Nor is it necessary that the Court should determine that the legislation complained of *does impair* the obligation of the contract. The federal question is raised when the complainant's bill alleges, in good faith, that the effect of the legislation is to impair the obligation of the contract.

Appellants' counsel present the jurisdictional question as if complainant's only objection to the Act of 1903 is that Section 32 provides that an assessment against the owner of any interest in land shall be a lien upon the fee. It is insisted that this

section should be so construed as not to create a lein upon the fee, when the fee is exempt from taxation. To this end it is argued that the holding of the Supreme Court of the State in the *Skidmore case* should be read into the act so as to protect the University's title from the lien of assessments made against its lessees. It is also argued that the exemption clause in the Assessment Act of 1903, as construed in the *Cheney case,* is broad enough to protect the *fee* of the University from an assessment against it, and from a lien of an assessment against its lessees. This argument, if correct, can in no event affect the jurisdictional question. The attack made on Section 32, in the bill, is not that it impairs the obligation of compainant's charter contract, but that it authorizes the fastening of a lien on its property, without notice to the University, in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution.

The bill charges that Subsection 5 of Section 5 of the Assessment Act of 1903, which authorizes the assessment of taxes against the tenant for years, changed the law which theretofore existed in Tennessee, and authorized the assessment of taxes against the lessee, instead of the lessor, as had theretofore been done. No exception was made in the statute as to exempt property.

Therefore, while under the law, as it existed at the time the charter was granted, and up to the passage of the Act of 1903, the entire interest in the thousand acres owned by the University has been exempt from taxation. Subsection 5 of Section 5 of the Act of 1903, impaired this exemption by providing for the assessment of taxes against the lessee on his interest in the property and his interest in the buildings thereon. It was charged that this lessened the value of the property to the University—decreased its rental value and was an indirect tax against and burden on the University. The Attorney General and his associate counsel agree with us as to the construction of Subsection 5 of Section 5, of the Act of 1903, and they insisted in their answer, *and insist in this Court, that this section does authorize the assessment of taxes against the lessees of the University.* They deny, however, that this is an indirect tax

on the University, and a burden on the University, or that it impairs the charter exemption of the University.

Of course, it is conceded that if Subsection 5 of Section 5, of the Act of 1903, does impair the University's charter exemption—in other words, if the assessment of taxes against the lessees of the University of the South is a burden upon the University, which violates its charter exemption from taxation, then a federal question arises, because it necessarily results that this law of the State impairs the obligation of complainant's charter contract. On the other hand, if the assessment against the lessees is not a burden on the University and *does not* impair or violate its charter exemption, complainant is entitled to no relief. Hence, if complainant is entitled to any relief on the merits, the federal question necessarily exists.

The taxing officers of Tennessee have attempted to assess this property, claiming the right to do so under the Assessment Act of 1903. The Attorney General of Tennessee, representing the State, is here strongly insisting that this act of the General Assembly of Tennessee authorizes the assessment of this property. We concede that the statute, upon its face, authorizes the assessment. The only question is, does this assessment violate the charter contract made by the State of Tennessee with the University that its property should be free from taxation?

Again it is argued that if we are right in our insistence, that an assessment against the lessees of the University is a burden on it, and impairs its charter rights, then the Act of 1903, which authorizes this assessment, is void, because it is in conflict with the Constitution of Tennessee, which forbids the passing of any law impairing the obligation of a contract. It is insisted that this act is not a law if it is in conflict with the State Constitution, and therefore the federal court has no jurisdiction.

Probably most of the States in the Union have similar provisions in their State Constitutions. If appellants are right in this insistence no suit could ever be brought in a federal court to protect rights violated by State legislation. The answer could always be that if an act impairs the obligation of the contract,

and is in violation of the Federal Constitution, it also violates the same provision in the State Constitution, and is not a law of the State. In this way citizens would be absolutely without the right of applying to the federal courts for protection of their rights guaranteed by the Constitution of the United States.

In the case of *Citizens' Street Railway Co.* v. *City Railway Co.*, 56 Fed., 746, a statement of which has already been referred to, as reported on appeal in this Court, the same insistence was made in the Circuit Court, that we are now replying to, to which the Court said:

> "It is contended that the constitutional guaranty which prohibits a State from passing any law impairing the obligation of contracts must be read into the State statute, and, thus read, the statute would not confer any authority on the city to make the contract and enact the ordinance in question, and, therefore, no federal question would be involved. If such concession were granted, it is argued that no law of the State, however clearly it might impair the obligation of contracts, would present federal question, because the bane and antidote would go together. If the constitutional prohibition was read into the State law, the federal question would still remain. The federal question in all such cases is, does the statute of the State, or a grant made by a municipality thereunder, when fairly construed and treating it as otherwise valid, present a case falling within the probition of the constitutional guaranty in questi n?"

When that case reached this Court this insistence was, presumably, abandoned, or at least it was not even mentioned in the opinion of this Court, sustaining the jurisdiction of the Court.

This provision was in the Constitution of Tennessee when the case of the *Union and Planters' Bank* v. *the City of Memphis, supra,* was before the Circuit Court of Appeals, involving a statute of Tennessee which it was claimed was passed in violation of the charter contract in controversy in that case, and

the jurisdiction of the Circuit Court was sustained because of this allegation.

This Court sustained the jurisdiction of the Circuit Court in the case of *Knoxville Water Co.* v. *the City of Knoxville, supra,* in which the distinguished Attorney General of Tennessee, who is now making this argument on behalf of the State, insisted that a statute or Tennessee violated the contract rights of the complainant in that cause.

So that this provision of the Constitution of Tennessee has not heretofore prevented this Court, and other federal courts, from sustaining the jurisdiction of a Circuit Court, when it has been alleged by the complainant that statutes of the State of Tennesse have violated contract rights.

Manifestly, a federal question arises when it is alleged that some statute passed by the lawmaking body of a State, or city ordinance passed under color of authority from some such statute, violates the complainant's contract rights. If appellants' insistence is correct that no federal question exists, unless the act complained of is a law in the sense that it is a valid, constitutional law of the State, then no such federal question could ever arise, because no statute is a valid law of a State which violates either the State or the Federal Constitution, and a law impairing the obligation of a contract always violates the Federal Constitution, and is, hence, no valid law of the State, regardless of such a provision in the State Constitution. Necessarily, the federal question arises when it is insisted that a statute does violate this provision of the Federal Constitution *and it is this allegation* that gives the Court jurisdiction.

Equity—Jurisdiction.

In the demurrer appellants insisted that the Circuit Court, sitting as a court of equity, had no jurisdiction because no ground of equity was shown, and because there was a remedy at law.

We assume the distinguished counsel have, upon investigation of the authorities, abandoned this position, as they have made no such argument in their brief. The authorities are clear on this point.

In the case of *Union and Planters' Bank* v. *City of Memphis, supra,* Judge Lurton, speaking for the Court of Appeals, said:

> "There must exist some equitable ground for relief besides the mere illegality of the tax. If it appears that the tax constitutes a cloud upon the title of the complainant, or that he will be subjected to irremediable damage or to a multiplicity of suits if compelled to rely upon his legal remedy alone, equity will interpose upon the ground of the inadequacy of the remedy at law."

And in the case of *Taylor* v. *L. & N. R. R.,* 88 Fed Rep., 350, the Circuit Court of Appeals sustained the Court's equity jurisdiction to prevent a multiplicity of suits, and also because the illegal tax complained of would create a cloud upon complainant's title.

Among other things, it was said:

> "The ordinary rule is that statutory remedies at law furnished by a State in its own courts will not oust the equitable jurisdiction of the Federal Courts of equity. This has been laid down with emphatic clearness by Mr. Justice Harlan, speaking for the Supreme Court, in *Smythe* v. *Ames,* 169 U. S., 466, 516, 18 Sup. Ct., 418. In that case it was argued that equitable jurisdiction to enjoin the action of a State railroad commission from putting into force an order fixing confiscatory railroad freight rates was prevented by the circumstance that the State had furnished a special remedy at law in the State Supreme Court for the revision of any unreasonable action by the commission. The argument was not successful. Mr. Justice Harlan said: 'One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that Court, and he can not be de-

> prived of that right by reason of his being allowed to sue at law in a State Court on the same cause of action.' "

In this case the University alleges that this illegal tax will create a cloud upon its title by virtue of that provision of the act making the assessment against the lessees a lein upon the fee of the lessor. It would also confessedly create a cloud upon the title and be a lein upon the leasehold interest of the lessees, and if the tax is illegal and creates a cloud upon the title of the lessees, and this was a burden upon the University, and reduced its rents therefrom, it would give the University a right to the injunction on this ground alone. Confessedly the University would have a right to an injunction in order to prevent a multiplicity of suits, because, as shown in the bill, there is something near 160 different assessments, and if it had any remedy at all, which it has not, not being a party to the assessment, it would require 160 suits on the part of the University to remove this cloud and be relieved from this illegal tax, and, of course, it requires no argument to show that a court of equity has jurisdiction in such a case.

A court of equity would have jurisdiction because it is a suit to protect the exemption against a multiplicity of suits; that is to say, the continued and repeated attempt to tax the property. As said by Judge Lurton, in the case of *Union and Planters' Bank of Memphis* v. *City of Memphis, supra*

> "This case made by the bill is not the case of an objection to a single or particular assessment. The complainant sets up a claim of complete exemption, not only against the particular assessment, but against all future efforts to assess its capital stock."

He quoted with approval from Chief Justice Marshall, in the case of *Osborn* v. *United States Bank*, 9 Wheaton, 738, as follows:

> "The single act of levying the tax, in the first instance, is the cause of an action at law; but that affords a remedy only for the single act, and is not equal to the remedy in

chancery, which prevents its repetition and protects the privileges."

To the some effect is the holding of the Court in the case of *Bank of Kentucky* v. *Stone, supra,* where the Court said:

> "The complainant is seeking to enforce a privilege or exemption which it avers has already been established by the decision of the highest courts of the State. To how much more litigation is it to be subjected? Can it not have a remedy in equity against future attempts to invade the privileges already decided to belong to it?

THE BILL IN THIS CASE DOES NOT ENJOIN A SUIT IN A STATE COURT.

Appellants insist that the injunction granted by the Circuit Court in this cause enjoins a suit in the State Court, in violation of Section 720 of the Revised Statutes of the United States.

To sustain this argument it is insisted that the Trustee, D. S. Osborn, who was attempting to make the assessment complained of, was a Court, and that the proceeding to assess and back-assess this property was a suit, within the meaning of said statute. This insistence can not be maintained.

Under the laws of Tennessee, each county has a Trustee, who is the treasurer of the county, and an *ex officio* tax collector. Under the Assessment Act of 1903, he was given authority to assess property that had been entirely omitted by the tax assessor, and to reassess and back-assess property that had been inadequately assessed. Section 31 of said act provides that when property is assessed at less than its value, either the County Court Clerk or the Trustee may issue a notice to the owner thereof to appear before the Trustee, upon day named in notice, and show cause, if any, why said property should not

be back-assessed or reassessed at its actual cash value. Said Trustee is authorized by this section to send for witnesses, and to take such steps as he may think proper to obtain information and evidence as to the value of the property, but he is not made a Court under this section. He is merely authorized to take these steps for ascertaining the actual value of property that has been inadequately assessed, and when assessed, it is provided that it shall be entered upon the assessment books as if it had been originally assessed. The result of his action is nothing more than any other assessment. But this is not the section under which the property in controversy is sought to be assessed, because this property was not inadequately assessed, *but was entirely omitted from assessment.*

Section 39, of the same act, provides as follows:

> "That should the property in any district or ward, or any part thereof, escape assessment, or fail in any manner to be assessed, the Trustee is hereby required to assess the same at its actual cash value, and report the amount of the taxes thereon collected to the County Court as 'picked up' taxes, at the same time he reports lists of errors, etc., giving a description of said property, district or ward in which located, and the Clerk of the Court is hereby required to certify a copy of said report to the officer with whom the Trustee, by law, is required to settle; and the Trustee shall account for the same in making final settlements of his various accounts; but no assessment authorized by this section, or by Section 31 of this act shall be made for any other years than for the years in which said assessments shall be made, and for three years preceding same."

This is the only section of the act providing for asesssment of property that has escaped taxation altogether, and by this section the Trustee is made a special tax assessor. When the assessment is made, it is nothing more than an ordinary tax assessment.

It is true that in this case the Trustee gave notice to the various lessees of the University of the South, under the direc-

tion of the State Revenue Agent, defendant Jetton, and they appeared and resisted the assessment of their property. This notice, however, the Trustee was not required by the statute to give, nor were the lessees required to appear and object to the assessment. Under this statute, it is hard to conceive how a tax assessor can be held to be a Court, how his act, in assessing property, can be held to be the determination of a suit in a State Court.

Assuming, however, that this was a proceeding to reassess, or raise the assessment, on property that had been inadequately assessed, still the Trustee in such a case is not a Court, though he may perform *quasi* judicial functions. In the case of *Grundy County* v. *the Tennessee Coal, Iron & Railway Co.*, 94 Tenn., 295, it was insisted that the assessment, by the Trustee, was void, because he acted as a Court in making the assessment, and he was allowed, under the law, a commission on the taxes assessed and collected by him. The Constitution of Tennessee forbids the judges of the State Courts to try any cause in which they have an interest. The Court said:

> "While the assessor, in the discharge of his duty, exercises a *quasi* judicial function, still he is not a judge of the Supreme or inferior Court in the sense of the constitutional provision, and that provision can not be held to apply to such an officer."

The Federal Courts have so often held that where the jurisdictional grounds exist they have the power to enjoin State officers from making illegal levies of taxes, and to enjoin State boards of equalizers from proceeding to enforce illegal assessments, and, indeed, to enjoin all manner of proceedings before special tribunals, that we deem it unnecessary to cite authorities on this proposition.

Counsel for appellants cite the holding of the Supreme Court of Tennessee, in *Briscoe* v. *McMillin*, 117 Tenn., 115, where it is held that the State board of equalization exercise *quasi* judicial powers and is a *quasi* Court. Yet the Federal Courts have more than once enjoined proceedings before this board, as shown by Tennessee cases hereinbefore cited.

The right to enjoin an assessment made by the State board of equalization of Tennessee, and to restrain said board from proceeding with an assessment, was sustained in the case of *N., C. & St. L. Ry.* v. *Taylor et al.*, 86 Fed., 168; *Taylor* v. *L. & N. R. R., supra; Taylor* v. *L. & N. R. R.*, 172 U. S., 647. In the case of *Bank of Kentucky* v. *Stone, supra,* the State board of equalizers and assessors were enjoined from proceeding with an assessment, though that tribunal had vastly more judicial power than the Trustee in this case.

In the cause of *Illinois Central R. R.* v. *Adams, supra,* this Court sustained the right of the Circuit Court to restrain the State railway commission of the State of Mississippi from approving and certifying an assessment for taxes against a railroad. The State Revenue Agent was also enjoined from beginning or advising the bringing of suits against said railway company.

In the case of *Smythe* v. *Ames,* 169 U. S., 466, this Court sustained an injunction issued to restrain the railway commission of the State of Nebraska from hearing and determining complaints against certain railway companies, on account of acts done by them, which were forbidden by a statute passed by the General Assembly of the State of Nebraska, the validity of which was attacked in the bill.

The very question was before this Court in the case of *Mississippi Railway Commission* v. *the Illinois Central Railway Co.,* 203 U. S., 335. It was insisted that an injunction could not be maintained to restrain proceedings before said railway commission, because it was a State Court within the meaning of Section 720 of the United States Revised Statutes. This commission had the power to hear and determine certain questions affecting the rights of railway companies. Mr. Justice Peckham, speaking for the Court, says:

> "It is also objected that an injunction will not lie from a United States Court to stay proceedings in a State Court because of the provisions of Section 720, United States Revised Statutes. The commission is, however, not a

Court, and is a mere administrative agency of the State, as held by the Mississippi Supreme Court. *Western Union Telegraph Co.* v. *Mississippi Railroad Commission,* 74 Miss., 80."

In the case cited the Supreme Court of Mississippi held that the duties of the commission were *quasi* judicial, but it was an administrative agency, and not a Court.

Certainly the appellant trustee is nothing more than a part of the tax machinery for the purpose of assessing and collecting taxes — one of the administrative agencies for the State of Tennessee, and Franklin County.

This act (Section 720) was passed March 2d, 1793. At that time the Removal Act of 1789 was in force, authorizing the removal of causes from any State Court to the Circuit Courts of the United States where the suits were between citizens of different States, and in certain other cases. While it was provided that injunctions should not issue from the Federal Courts to restrain suits in the State Courts, yet, in proper cases, suits might be removed from the State Courts to the Federal Courts under the Removal Act. Hence, nonresidents had the right to transfer litigation from the State Courts to the Federal Court, not by injunction, but by removal. Evidently the "State Court" referred to in these two acts meant the same character of Court.

It has been frequently held that the State Court referred to in the Removal Act applied to the regularly organized Courts of the States, and not to such tribunals and boards that exercised special judicial functions.

For instance, if the Trustee was a State Court within the meaning of these acts, nonresidents would have a right to removed proceedings to back-assess their property to the Federal Court by petition. Of course, this could not be done.

In the case of *Mississippi and Rum River Boom Co.* v. *Patterson*, 98 U. S., 403, it was held that commissioners appointed to determine and report on the valuation of property in a con-

demnation proceeding were not a Court, and proceedings before them could not be removed to the Federal Court.

In the case of *Union Pacific Railway Co.* v. *Myers*, 115 U. S., 1, it was held that a condemnation proceeding, tried, under the law, before a mayor and a jury, from whose judgment an appeal was taken to the District Court of the State, might be removed, while pending on appeal in the District Court, because the mayor and jury before whom the case was first tried did not constitute a Court within the meaning of the Removal Act.

See also *Clinton* v. *Missouri Pacific Ry.*, 122 U. S., 469.

THE ASSESSMENT AGAINST THE LESSEES IS A BURDEN ON THE UNIVERSITY, AND VIOLATES ITS EXEMPTION CONTRACT.

When we remember the circumstances under which this charter exemption was granted by the State of Tennessee to the University of the South, the injustice of attempting to burden its thousand-acre reservation with taxes, either directly or indirectly, is very apparent.

The organization of this University was a popular movement, throughout the Southern States, in which the people generally took great interest. The history of this movement is correctly set out in the bill to which reference has been made, and more in detail by Major Fairbanks in his deposition. (Rec., pp. 81 to 117.) There was great rivalry between many localities in the various Southern States with reference to the location of this University, and great inducements were offered by the several cities located in other States. (Rec., p. 87.) The inducement offered by the State of Tennessee was that specially set forth in Section 10 of the charter. The two things embodied in this section of the charter that appealed most strongly to the committee, and which caused Sewanee to be selected as the site of this University were these: (1) They desired the

University to be located at some point far removed from the evils and temptations of city life, where the officers of the University could be in control of its surroundings; where they could keep the student body free from contact and communication with objectionable people, and contaminating influences. This purpose is set forth in this section of the charter, wherein it is recited:

> "That said University may hold and possess as much land as may be necessary for the buildings, and to such extent as may be sufficient to protect said institution and the students thereof from the intrusion of evil-minded persons who may settle near said institution."

(2) It was, of course, greatly desired that this University, and as much of its property as possible, be exempt from taxation. And this inducement was held out by the State and accepted by the University as shown in the latter part of that section, as follows:

> "One thousand acres of which, including buildings and other effects and property of said corporation, shall be exempt from taxation as long as said lands belong to said University."

We think we can demonstrate that the Assessment Act of 1903, of which we complain in this cause, violates this contract and impairs this obligation, with reference to both of the inducements thus offered by the State of Tennessee to the University, and as a result of which the University was located in Tennessee.

At the time this charter was granted, and until the passage of the Act of 1903 complained of, the common law rule that taxes on leased property should be assessed to the lessor, prevailed in Tennessee. This rule is well established. *Taylor, on Landlord and Tenant, Section* 341.

The question was recently passed on in Tennessee in the case of *East Tennessee, Virginia & Georgia Railway Co.* v. *The Mayor, etc., of Morristown,* 35 Southwestern Rep., 771, decided

by the Court of Chancery Appeals, and affirmed by the Supreme Court of Tennessee. It appeared that certain property in Morristown owned by the railway company had been leased to one King for ninety-nine years, with a provision in the lease that at the end of that period the buildings might be removed by the lessee. The authorities assessed the entire property, including the buildings, to the railway. The railway company filed a bill in the State Court to enjoin the assessment. The lessee, King, was made a defendant also, and it was charged that he, the lessee, was liable for these taxes. The Court, speaking through Mr. Justice Neal, who is now a member of the Supreme Court of the State, said:

> "As between the lessor and lessee where the lease contains no covenant for the payment of taxes, the lessor must bear the burden of taxes on the leased estate."

And again:

> "The said land in question was still taxable to the complainant railway company. For the purpose of taxation it was the owner, just as the life tenant is, for the same purpose, owner of the property in which he holds such estate."

The Court held, however, that the buildings, being removable by contract, and hence personal property, should have been assessed to the lessee. Continuing, the Court said:

> "Inasmuch as the assessment included property for which the railway company was not justly taxable, the buildings and structures, and as the value thereof in the assessment as made, is inextricably mingled with the value of the leasehold estate, and also *because the leasehold estate should not have been taxed as a distinct item of property, but should have been included in the general assessment of the land itself against the lessor, railway company, the assessment is void.*"

Thus, when this exemption was granted, the leasehold interests were assessable *as a part of the whole estate* to the Uni-

versity, as lessor, and was a part of the estate exempted from taxation by this charter.

In the case of the *University* v. *Skidmore, supra*, it was insisted, by the attorneys for the State, that because the University had leased this property to various tenants it had thereby parted with its exemption, and the property should be assessed for taxes. In that case no attempt was made to assess the lessees, because there was no statute in Tennessee permitting an assessment against the tenant, and the lessor was liable for taxes on the leasehold estate. Yet the question as to whether the leased property was assessable for taxes was directly involved; the only difference between that case and this being that in that case the attempt was made to assess the lessor with the taxes, and in this case the attempt is to assess the lessee with taxes on the same property. The Supreme Court of Tennessee, in that case, said:

> "Under the tenth section of this charter, as quoted, the exemption is not made to depend upon the use to which the land might be put, but relates to the *title*—'so long as such land *belongs* to said University.' The attention of the Legislature was called to the fact that the State might at some time resume the right to tax this property, and it stipulated that this right should be resumed, not upon the condition that the University *rented or leased* the property, or made any other lawful use of it, but upon the condition the University parted with its title. The Legislature conceived, it is evident, that this property might be owned by the University, and that such ownership would not be an act outside of the purposes and objects of the corporation, and made no limitation upon its use. It is the legal and moral duty of this corporation to so use the property, and all other assets belonging to it, as to best promote the ends and purposes for which it was created; and if by leasing it an income to the University can be created, and by this income it is enabled to extend its usefulness, it is the right and *duty* of this corporation to do so. By this means the property is made to contribute directly to the support of the institution, and subserve the great public purposes for

which it was created, and which the Constitution of the State enjoins upon the Legislature at all times to foster and 'cherish.' It would be hard to conceive to what uses, other than leasing or renting it to select persons, where business, trades, or occupations would be directly or remotely auxiliary to the necessities or convenience of the University and its inmates and officers, the corporation could put this one thousand acres of land which the Legislature authorized it to hold. The power to hold the ten thousand acres was to enable the corporation to keep 'evil-minded persons' at a long distance from the University, and from contact with the young men and youths attending it. The ownership of ten thousand acres, with the University located near the center of the tract, would make it the 'master of the situation' as respects that class of persons whose presence or proximity was not desirable."

Here it was decided that the *property* is exempt from taxation so long as the title remained in the University of the South.

Can the State violate this contract and tax this exempt property by simply passing a statute changing the *method* of assessment?

In the case of *State of New Jersey* v. *Wilson*, 7th Cranch, 164, the Colony of New Jersey had contracted, in a treaty with the Delaware Indians, that certain land in that State should be exempted from taxation. The Indians afterwards, with the consent of the State, sold these lands. The State thereupon attempted to assess the purchasers with taxes. This Court held this could not be done, Chief Justice Marshall, delivering the opinion of the Court, said:

"Every requisite to the formation of a contract is found in the proceedings between the then Colony of New Jersey and the Indians. The subject was a purchase on the part of the government of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect was

made, the terms stipulated, the consideration agreed upon, which is a tract of land with the privilege of exemption from taxation; and then, in consideration of the arrangement previously made, one of which this act of assembly is stated to be, the Indians execute their deed of cession. This is certainly a contract clothed in forms of unusual solemnity. The privilege, though for the benefit of the Indians, is annexed, by the terms which create it, to the land itself, not to their persons. It is for their advantage that it should be annexed to the land, because, in the event of a sale, on which alone the question could become material, the value would be enchanced by it."

Here it was held that the exemption attached to the property and passed to the purchaser. In the case at bar it has been held that the exemption attached to the property so long as the title remains in the University, and that leasing the property does not take the title out of the University so as to destroy the exemption. In the New Jersey case cited, it was said that the exemption was for the benefit of the Indians. In that sense, it was a personal exemption to them, and, as stated, it enhanced the value of the property in case of a sale. In the case at bar appellants insist that the exemption is personal to the University. The exemption was for the benefit of the University, but it attaches to its property for a period definitely fixed in the charter, that is to say, so long as the title remains in the University. The exemption is for the benefit of the University, and, as the record shows, materially *enhances the value* of its property in leasing same. It is this *value* that the act we are complaining of destroys.

Dr. B. L. Wiggins, the Vice Chancellor of the University, in his testimony, fully explains the value of this exemption from taxation in leasing the property. He testified as follows:

"Q. State whether or not the fact that this property is exempt from taxation is taken into consideration in fixing the amount of rent when the leases to your tenants are executed?

"A. Yes, and from the very foundation of the University the exemption from taxation has always been regarded

as a valuable asset. In the annual catalogue and announcements, and other publications, for many years, the University has used the following expression which I now quote from the 'Catalogue of Announcements' for 1906-1907, page 32, which same expression is to be found in the catalogue for previous years: 'Building lots are leased at reasonable prices for a long term of years to suitable persons. *Inasmuch as the entire one thousand acres of reserve, with all improvements, is exempt from taxation, lessees secure valuable privileges for a nominal sum.*' It will thus be seen that the University has always, in fixing the rent, taken into consideration that the improvements attached to the freehold and were the property of the University, and that the tenant was to enjoy only a limited use of such improvements. The University stipulates in the several leases a sum representing the minimum value of such improvements, in some cases more, in some cases less, according to the location of the lot.

"Q. It if should be held that the tenants are taxable under the proceedings which we have enjoined in this case, I will ask what would the effect on the rates of the University be?

"A. It would materially depreciate the rental value, and would act as a deterrent to prospective leaseholders." (Rec., pp. 162, 163.)

It was insisted, however, by appellants' counsel in arguing this case before the Circuit Court, that, notwithstanding the fact that this exemption was taken into consideration in fixing the amount of rent to be paid by the University's lessees, and that they contracted upon a basis of immunity from taxation; nevertheless, as the contracts were already entered into, the fact that the lessees would have to pay taxes on the property, thus leased, could not reduce the amount of rents, they would have to pay the University, on their said lease contract.

We hereto annex copy of the form of the lease contract between the University and its various tenants. It will be ob-

served that this lease contract provides for two renewals thereof. The terms of the renewals are stated as follows:

> "And at the expiration of the present term, the University of the South shall have the option of taking the premises by paying for all the improvements made thereon, or may renew the lease for another term of ——— years, on such terms as may be agreed upon by the parties respectively, and may also give a second renewal for ——— years; and in case the parties can not agree upon the value of the improvements or the rental to be paid for a new term, the same shall be determined by arbitration; one of the arbiters to be selected by the commissioner of buildings and lands, and the other by the lessee; and, in case they can not agree, they shall call in an umpire; provided, however, that in fixing the rental for the new term, the value of the improvements shall not be taken into account as against the party of the second part. (Rec., pp. 175-6.)

Thus the University is required to enter into a new contract, as to the amount of rent to be paid, at the expiration of each term. Necessarily, if the property is assessable for taxes, as against the lessee, it will not be so valuable to him as when free from taxation. As shown, this immunity from taxation entered into and became a part of the original lease contract, and was one of the things taken into consideration in fixing the annual rent thus contracted for. This element of value in the property of the University is thus destroyed by this act of which we complain.

The Vice Chancellor exhibited a table showing the list of lessees and the amount of annual rents paid by each, together with the number of renewals provided for in each, and date of expiration of each renewal. (Rec., pp. 183 to 190.)

This table shows that as to many of the lessees the first term of these leases have expired, and that there has been but one renewal of the entire number of leases. The remainder of these leases will soon expire. Thus it will be seen that the University is now confronted, in its dealings with its lessees, with the proposition of renewing its leases, on the basis of the

property being assessable for taxes against the lessees, instead of free from taxation, as when the original lease contracts were entered into. So that necessarily this burden of taxation falls now, directly and immediately, upon the University.

But, it is said, these lease contracts provide that the lessees shall pay all taxes and assessments on the property leased. It is true this provision is contained in the lease contract, but this is fully explained by the Vice Chancellor as follows:

> "Q. I notice in the copy of the lease filed in the case of the University of the South and A. J. Skidmore, a provision for the lessee to pay taxes and assessments. Please explain the meaning of this provision?
>
> "A. An explanation was given by Major George R. Fairbanks in his deposition in the case of the *University of the South* v. *A. J. Skidmore, Trustee*, 1887. That explanation is the correct one, to wit: that the amended charter, 1869, authorized the University to establish police and municipal regulations. Acting under this provision, the University at one time did proceed to levy a tax upon the leaseholders for the maintenance of roads, etc. The phrase in the lease, 'Taxes and assessments,' had reference to such *municipal taxes*, and not to taxes levied under the authority of State and county. The question may naturally be asked why, in reprinting the lease forms, the phrase was allowed to remain, to which I would answer that leasehold improvements outside of the one thousand-acre reservation have always been considered subject to taxation, and, as a matter of fact, taxes have always been paid upon such leasehold improvements. The phrase, 'Taxes and assessments,' would properly apply to such case, and as the one thousand-acre reservation is only about one-eighth of the University domain, and the number of leasehold improvements on this 'outside' domain will continue to increase, it is well that the form of the lease should remain unchanged." (Rec., pp. 161-2.)

This explanation is obviously correct, because, as heretofore shown, none of the lessees contemplated that they would have

to pay any taxes, and the University held out to them in its catalogue, as an inducement to lease the property, that it was free from taxation.

Necessarily, this provision did mean only local or municipal taxes, because the law of the State, entering into all contracts made by the parties, expressly provided, as set forth in the charter of the University, that the property should not be assessable for State and county taxes, and at the time these contracts were entered into the taxes could only be assessed under the laws of the State, against the lessor.

Thus it will be seen that this tax against the lessee is a tax on the right to occupy the land. As stated by the learned judge delivering the opinion in the *Skidmore case,* "It would be hard to conceive to what use, other than leasing it or renting it to select persons," this property could be put. Hence, in taxing the property when leased, or in taxing the interest leased, a tax is placed upon the only use to which the property can possibly be put, to be made of value to the University. The State insists that, while it may not tax the property directly, it may, nevertheless, tax its use or right of occupancy; while it may not tax the land, it may, nevertheless, tax the rent or income from the land, and thus burden its only value to the University.

In the case of *Pollock* v. *Farmers' Loan & Trust Company,* 157 U. S., 427,—the *Income Tax Cases,*—this Court held that a tax on the rent, or income, from land was a direct tax on the property itself. Among other things, Mr. Chief Justice Fuller said:

> "The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income incident to its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value, or annual user, of real estate appears to us the same in substance as an annual tax upon the real estate which would be paid out of the rent or income."

In the case of *Dougherty* v. *Thompson,* 71 Texas, 202, the Supreme Court say:

> "County school lands, when leased to raise an available school fund, are as exclusively devoted to the benefit of the public as if covered with schoolhouses; and the Constitution forbids the taxation of *means* through which said lands may be made to yield a revenue, without sale, as fully as it forbids the taxation of the land. Forbidding the taxation of the land, it forbids the taxation of an estate less than the fee, whether imposed on the County or its lessee."

In the case of *Moseley* v. *State,* 115 *Tennessee,* 52, the Supreme Court of Tennessee recently held that the income derived from United States bonds was not assessable for taxes when collected, on the principle that the bond itself being exempt from taxation, the income derived therefrom was likewise exempt.

Authorities are cited by counsel for appellant, in their brief, which they insist sustain their right to assess this property. It will be observed, however, that in none of these cases were the parties, resisting assessment of taxes, protected by an exemption contract such as this. In none of these cases was it shown that the assessment of the tax *impaired an exemption contract.*

In the case of *San Francisco* v. *McGinn,* 67 *California,* 110, a lessee insisted that his property was exempt, because it was leased from the city and county. It was held that, under the Code of California, the lessee was the owner for purposes of taxation. That was merely a matter of construction of a State statute and not an invasion of a contract exemption from taxation. The county and city, being arms of the State government, were immune from taxation. But the county and city were not complaining of an attempt to violate their exemption; on the contrary, they were the beneficiaries of the assessment.

So in the *Gaines* case, cited in appellants' brief, it was held by the Supreme Court of Arkansas that the lessee's improvements were assessable for taxes under the statutes of that State. The land was leased from the United States. It was not shown that the United States government had any interest whatever in these improvements, nor that its rights were in any way affected by the assessments; nor was the government complaining of the assessment; on the contrary, the government conceded the right of the State to tax the lessee's improvements.

And so in the case of *State* v. *Tucker,* 38 *Nebraska,* 56, cited by adversary counsel. The United States government, being the owner of the fee in the property, was exempt from taxation. But the government did not object to the assessment made, nor was it shown that the assessment did or could affect the rights of the government in the slightest.

The case of *Luttrell* v. *Knox County,* 89 *Tennessee,* 257, is also referred to to sustain appellants' insistence. In that case Luttrell built a bridge upon piers owned by Knox County under an indefinite lease from the County. He insisted that he could not legally be assessed for taxes because the county owned the piers, and the property was therefore exempt from taxation. By a divided Court (Judges Lurton and Snodgrass dissenting) it was held that the lessee was properly assessable for taxes on the superstructure. It was stated by the Court that Luttrell, the lessee, was not exempt from taxes under any contract, and hence he was in no way protected from paying taxes on property owned by him. There was no question in this case of the violation of any contract of exemption. Knox County was exempt from taxation because it was an arm of the government, but it did not claim to be injured by the assessment of the property; on the contrary, it was one of the beneficiaries of the assessment.

In the case of *Russell* v. *the City of New Haven,* 51 *Conn.,* 259, no attempt was made to assess the leasehold interest of the lessee, but only the improvements put upon the property by him. It was held by the Court that, under the contract, the title to the improvements was in the lessee. The lessor made

no objection to the assessment, nor was it pretended that the assessment in any way injured the lessor, or impaired the rights of the beneficiary of the exemption contract.

In the case of *Parker,* v. *Redfield,* 10 *Conn.,* 490, the lessee of exempt property was held liable for taxes on buildings placed on the property by him under a contract which gave him the right to remove his improvements. The rights of the lessor were not in any way affected, nor his exemption impaired by the assessment. The Court say:

> "In this view of the case, it is difficult to see why this building, any more than other personal estate of the lessee, should be exempted from taxation. And it is equally difficult to see what contract exists, the obligation of which is impaired, by taxing this property. It is in vain to say, that any contract with the *Episcopal* society is thus either violated or impaired. The contract between them and the government was, that *the land,* granted by the conveyance of 1765, should be forever exempted from taxation. And it has been exempted. Does this exemption extend to personal property, placed upon the premises by another; which the society do not own, from which they derive no rent, and over which they have no control? Has the plaintiff any ground of complaint? He derives no title to this building from the *Episcopal* society. As to that, he is not their lessee. The case finds, that he is the owner, having purchased it of a former owner; and that it has always been subject to taxation."

Appellants also quote from *Cooley on Taxation,* to the effect, that where the land is owned by one person, and the buildings thereon by another, the buildi[illegible] may be assessed for taxation, although the land be exempt. The same principle was announced in the case of *People* v. *Board of Assessors,* 93 N. Y., cited by counsel.

This is, of course, true, and it is in substance the holding of all the cases cited by appellants. In order to bring their case within the principle announced by the authorities, cited in their brief, appellants must show that the lessees owned the build-

ings erected upon the leased property. This would only give them a right to assess the buildings as separate personal property. It does not sustain their insistence that they have a right to assess the *leasehold interest* of the lessee, in the real estate, which they have attempted to do in this case; nor would it affect the validity of the Assessment Act, under which they are seeking to assess the leasehold interest in this exempt property.

There is no basis, however, for the insistence that the lessees own these buildings. The University owns the buildings. All the lessees have, is a right of occupancy, for a limited period. Among other provisions in the lease, it is agreed that the lessee is to put a certain amount of improvement on the property. At the expiration of the first term, the University has the option of taking possession of the premises by paying for all the improvements, or the renewal of the lease for another term. *At the expiration of the last renewal the University owns the improvements without paying anything.*

It is insisted, by appellants, that the provision in the lease, binding the University to pay for the improvements, if it elects to terminate the lease and take possession, at the end of the first or second term, makes the said improvements the personal property of the lessee until the University shall so elect to pay for the improvements and take possession thereof.

This is manifestly an incorrect construction of the agreement. The lessee binds himself to put the improvements on the property, and the lessor binds itself to pay for the improvements under certain conditions. The stipulation to make the improvements on the property is for the benefit of the lessor; the stipulation to pay for the improvements is for the benefit of the lessee. In its last analysis, it is nothing more nor less than an agreement, between the owner of the real estate and his tenant, for the tenant to put improvements on the owner's property, for which the owner is to pay. This contract no more gives the lessee title to the improvements than it would give a stranger, with whom the University contracted to improve its real estate, the title, to the improvements put upon the property by him, under contract.

In the case of *Kutter* v. *Smith*, 69 U. S., 491, Mr. Justice Miller, speaking for this Court, said:

> "There was in the contract of lease between Link and Sherman a covenant that, at the expiration of ten years from the first day of May, 1859, it should be at the election of the lessor to purchase the buildings erected on the leased premises at their appraised value at that time, or renew the lease of said premises for the term of ten years longer, at a rent to be appraised in like manner by disinterested persons; and this election, on the part of the lessor, was to be exercised at the expiration of every ten years for the period of ninety-nine years."

The lessee assigned his lease, and failed to pay the rent, for which reason the lessor took possession, and the lessee's assignee brought suit for the value of the building. As to this insistence, the Court say:

> "It is argued that the plaintiff's assignor became the owner and had title or estate in the building, as separated and distinguished from the land; and while the defendant had the right to enter, take possession, and hold for a failure to pay rent, that right was in some way subordinate to plaintiff's right to the house."

And again:

> "But we cannot concede that plaintiff or his assignor had, at any time, the legal title to the building as distinct from the lot. The well settled rule is, that such erections as this become a part of the land as each stone and brick are added to the structure. The only exceptions to this rule are the class of fixtures already adverted to, and such rights as may grow out of express contracts. The contract before us was not intended to change this rule. The agreement to purchase means nothing more than that, in a certain event, the lessor will pay the lessee the value of such building, but there is no implication of any general title or ownership in the lessee apart from that event."

In *Bass* v. *Metropolitan West Side Railway*, 82 Federal, 857, the lease contract was almost identical with the one we have in this case, except that the provision for the lessor to pay the lessee for the improvements at the expiration of the lease, used the word "purchase." The lessee (Gov. John P. Altgeld) assigned this lease, with the consent of the lessor, to the defendant railroad company. The railroad company attempted the destruction of a part of the improvements; when the lessor filed the original bill to enjoin the destruction. The insistence of the railroad company was that the improvements became the property of the lessee (having been erected by the lessee), but it was held this was not true. The Court said:

> It is also stipulated that, at the end of the term, the owner of the fee shall purchase the building or extend the term of the lease. It is clear, upon the whole instrument, that in no event was the removal, from the premises, of the building, which the lessee undertook to erect and keep in repair, contemplated. On no conceivable contingency can there arise under the contract a right on the part of the lessee to remove the buildings, even were it a physical possibility to do so. In the contemplation of the law the building was intended to be, and accordingly, in the process of construction, it became, a part of the realty."

And again:

> "Though in form the lessor is bound to purchase the building, the evident intention is simply that in one or the other modes prescribed, she shall make compensation for the erection of the structure and for keeping it in repair during the term of the lease."

It will be noticed that in both of the above cited cases the contract provided for the lessor to "purchase" the buildings at the end of the lease, while in our lease contract it is only provided that the lessor is to pay for the improvements.

In the recent case of *Fraer* v. *Washington*, 125 Federal, 280, the Court of Appeals for the Eighth Circuit put the same

construction on a lease contract very similar to ours, and held that the covenant for the lessor to pay the lessee for the improvements did not give the lessee any title to the improvements, but, on the contrary, the improvements became a part of the realty when constructed, and the title and ownership vested in the lessor.

In the case of *The People* v. *Barker,* 153 New York, 98, it was held that a shed erected by a lessee upon a pier leased from the City of New York under a lease requiring its erection, and providing that it was to become the property of the city at the expiration of the lease, became the property of the city immediately upon being erected and affixed to the realty, and it was held that this property was not assessable for taxes.

Neither the University nor its lessees have ever regarded or treated these improvements as belonging to the lessees. In the *Skidmore* case, the State attempted to tax these improvements, as well as the land, on the theory that said improvements belonged to the University. The University did not deny this, nor did it seek to evade liability for taxes on the ground that it did not own the improvements, but based its defense upon its right to an exemption under its charter. The Supreme Court of Tennessee in that case, treated these improvements as the property of the University, and the decision in that case is based on that theory. The Court say:

> "The assessments complained of were made and sought to be made upon the 1,000 acres of real estate and *improvements so rented or leased,* excluding therefrom the University building property and church, but including the houses of the professors. With the exclusion mentioned, the *assessment officers seek to assess this* 1,000 *acres and improvements thereon.*"

Not only was it held in the *Skidmore* case that these buildings were exempt from taxation, as the property of the University of the South, but the charter exemption in express terms provides that the *buildings* on the property shall be exempt from taxation.

In the cross-bill filed by appellant, Franklin County, in the *Skidmore* case, the State and County placed the proper construction on this lease contract in insisting that the buildings of the lessees belong to the University. It was charged:

> "And your orator shows the Court that when a tenant gets a lease for a term of thirty-three years, they erect their own houses thereon, and in addition to the rents received by the University for the lease of the premises, at the expiration of the term of years for which the premises are let, *the whole property, house and all, reverts to the University*, so that at the end of a comparatively short period of time the University will be the absolute and unconditional owner of the next to the largest town in complainant county."
>
> R., p. 38.

It will be observed that there is no provision in the lease for the removal of the buildings by the lessees. The only right given the lessees is *compensation* in case the University elects to take possession before the expiration of the last renewal.

The Assessment Act of 1903 provides, not only for the assessment against the tenant for years on his leasehold interest, and makes same a lien on the fee of the owner, but provides for a sale thereof, if default be made by the lessee in the payment of his taxes. In order to avoid the manifest invalidity of this act, in so far as it authorizes the sale of the fee in exempt property, without any notice to the owner of the fee, appellants insist that it was not intended to fasten a lien on the fee of the exempt property. It is insisted that, under a proper construction of this act, the lien should be limited to the lessee's interest in the property, and that the State would only have a right to sell the lessee's interest for the payment of taxes.

Assuming this construction to be correct, the injury to the University remains the same. If the State is permitted to assess the lessee's interest, and sell same for the payment of taxes, the University's control over this property is lost; and

one of the greatest advantages provided for, in Section 10 of the charter, is destroyed.

The University has retained the title to, and the absolute control over, this one-thousand-acre reservation. In this way it has been able to say who shall come near the University. The leases all provide that they may not be assigned without the consent of the University. But, if the State has the right to sell the property for taxes at public auction, as provided for in this act, the University is absolutely helpless to prevent the intrusion of outsiders. Its power to protect its students from contaminating influences will be gone, and one of the most cherished ideals of the University will have been destroyed.

At the invitation of the State of Tennessee this University was located in a barren wilderness, far removed from the evil influences of city life, so dangerous and so alluring to young men sent from their homes to universities. It has been one of the boasts of this university that it was protected, for all time, from these dangers and evils, provided against in its charter. For this purpose it tried the experiment of establishing a university at a place so remote from any city or town, where it could be in absolute control of its surroundings.

Thus the two things in the charter contract which caused this complainant to be located in Tennessee are violated by this simple provision in the assessment law, changing the common law rule that taxes shall be assessed to the lessor or owner of the fee, and providing that they shall be assessed to the lessee or tenant for years.

Can this contract thus be destroyed by indirection? We again quote from the opinion of Mr. Chief Justice Fuller in the *Income Tax Cases*:

> "If it be true that, by varying the form, the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution."

We have shown that under the law as it existed when this charter was granted, and until the passage, in 1903, of the

act complained of, every interest in this property was exempt from taxation, and this complainant was protected against the burdens from either direct or indirect assessments. Under the law as it existed, all the taxes against the property, whether leased or not, must be assessed against the University. The charter contract undertook to protect the University against such an assessment so long as it owned the property. That rule of the common law entered into and became a part of the contract as fully as if written in it.

We will quote at some length from the opinion of this Court, on this subject, in the cause of *The United States* v. *Quincy*, 71 U. S., 535:

> "It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement. Illustrations of this proposition are found, in the obligation of the debtor to pay interest after the maturity of the debt, where the contract is silent; in the liability of the drawer of a protested bill to pay exchange and damages, and in the right of the drawer and indorser to require proof of demand and notice. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement. *Green* v. *Biddle*, 8 Wheat, 92; *Bronson* v. *Kinzie*, 1 How., 319; *McCracken* v. *Hayward*, 2 How., 612; *People* v. *Bond*, 10 Cal., 570; *Ogden* v. *Saunders*, 12 Wheat., 231.
>
> "In *Green* v. *Biddle* the subject of laws which affect the remedy was elaborately discussed. The controversy grew out of a compact between the States of Virginia and Kentucky. It was made in contemplation of the separation of the territory of the latter from the former, and its erection into a State, and is contained in an act of the Legislature of Virginia, passed in 1789, whereby it was provided 'that all private rights and interests within' the

District of Kentucky, 'derived from the laws of Virginia prior to such a separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State.' By two acts of the Legislature of Kentucky, passed respectively in 1797 and 1812, several new provisions relating to the consequences of a recovery in the action of ejectment—all eminently beneficial to the defendant, and onerous to the plaintiff—were adopted into the laws of the State. So far as they affected the lands covered by the compact, this Court declared them void. It was said: 'It is no answer that the Acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much violation of the compact as if they overturned his rights and interests.'

"In *Bronson* v. *Kinzie*, 1 How., 319, the subject was again fully considered. A mortgage was executed in Illinois containing a power of sale. Subsequently, an act of the Legislature was passed which required mortgaged premises to be sold for not less than two-thirds of their appraised value, and allowed the mortgagor a year after the sale to redeem. It was held that the statute, by thus changing the pre-existing remedies, impaired the obligation of the contract, and was, therefore, void.

"In *McCracken* v. *Hayward*, 2 How., 608, the same principle, upon facts somewhat varied, was again sustained and applied. A statutory provision that personal property should not be sold under execution for less than two-thirds of its appraised value was adjudged, so far as it affected prior contracts, to be void, for the same reason.

"In *Sturges* v. *Crowinshield*, 4 Wheat., 122, the question related to a law discharging the contract. It was held that a State insolvent or bankrupt law was inoperative as to contracts which existed prior to its passage."

And again the Court say:

> "The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden."

The Court also quoted with approval from *Planters' Bank* v. *Sharp,* 6 How., 327, as follows:

> "One of the tests that a contract has been impaired is that its value has, by legislation, been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or cause, but of encroaching in any respect, on its obligation—dispensing with any part of its force."

Applying these decisions to the case at bar, we think it will require no argument to show that the exemption contract of the University of the South *is made less valuable* by the passage of this act complained of.

THE SCOPE OF THE DECREE.

It is insisted by appellants that, in any event, the decree is too broad, and that the injunction should be limited to any assessment made under the Act of 1903. So that appellants may be left free to assess the property under the Act of 1907 or any subsequent act.

We agree with adversary counsel, that the effect of this decree is to perpetually restrain any attempt to burden this property with taxes, either directly or indirectly. The decree protects, and should protect, the rights—the immunity from taxation—contracted for in complainant's charter. This is one of the reasons why it was necessary to come into the Federal Court for relief. Under the ruling of the Supreme Court of Tennessee, a decree in a tax case—although it may involve a charter exemption—has no binding force, except as to the taxes actually involved in the litigation. On the contrary, in the Federal Courts such a decree has all the binding force and effect of a decree on any other right involved. The difference

between the rules adopted in the Federal Courts and in the Courts of Tennessee, is fully discussed by Judge Lurton in the case of *Union & Planters' Bank* v. *The City of Memphis,* 111 Federal, 561.

Appellants insist that the Assessment Act of 1907 has so changed the objectionable feature of the Act of 1903 as to make an assessment of the lessee's interest valid. If we are correct in our insistence, that this property should be exempt from assessment, either made directly against the University, or indirectly by assessing the lessees, then there can be no such thing as a valid law burdening this property with taxation. The only change made by the Act of 1907 is that it is no longer provided that the assessment against the lessees shall be a lien on the fee of the owner. The purpose of the State, however, to assess the property through the lessees, and the determination of the General Assembly of the State to pursue that purpose, are made manifest by the Act of 1907. Section 5, part 5, of the Assessment Act of 1907, contains practically the same provision, for the assessment of the lessee's interest, as that contained in Section 5, Subsection 5, Chapter 258, of the Acts of 1903. The only difference is that the Act of 1907 expressly provides that the lessee's interest shall be assessed to him, notwithstanding "the fee, reversion, or remainder thereof is exempt to the owner." Under the Act of 1903, which we are attacking, it is provided that the interest of the tenant for years shall be assessed, and no exception is made in favor of the lessees, of property which is exempt. The Act of 1907 expressly negatives the idea of any such exception. But the two acts mean exactly the same thing, and both show the fixed determination of the General Assembly of Tennessee to burden this property with taxes, unless restrained by this Court. We agree with the conclusion of adversary counsel, as set out on page 67, in their brief in this cause, that the provisions of the Act of 1907 were not necessary to enable the State to tax the interest of the lessees, because that was provided for in the Act of 1903.

These changes, made by the Act of 1907, were evidently made in view of this litigation, and to sustain the insistence

of the Attorney General and his associates—(1) that the State did not intend to fasten a lien upon the *fee* of the University, and (2) that the State did intend, and had a right, to assess the interest of the lessees of the exempt property owned by the University.

As we have hereinbefore shown, the last named object is just as burdensome to the University as the first would be, and just as destructive of its rights. We, therefore, insist that the decree of this Court should be broad enough to forever protect the exemption guaranteed to the complainant University in its charter, from either direct or indirect taxation.

CONCLUSION.

Appellants insist that this exemption, protected to the extent we are insisting upon, gives the complainant an advantage it is not entitled to. It is argued that by the decree of the Circuit Court, the people of an entire town are enabled to avoid their just share of the burden of taxation borne by the citizenship of the State.

As has been shown, the place where the village of Sewanee is now situated was a wilderness. This University was located there at the invitation of the Sate of Tennessee. Attempting to establish a university in the heart of a wilderness, the founders of this institution first met failure in the misfortunes of the great Civil War. Starting again after the close of that conflict, the institution was opened with five students and two professors. Now they have a university equal to any in the Southern States with over forty professors and more than five hundred regular students. (R., p. 160.)

The University has constantly struggled with poverty. Its annual deficit has been more than seven thousand dollars. There is now and has always been a constant struggle to maintain the University and build it up along the lines contemplated by its founders. (R., p. 160.) In doing this, the University has not been able to erect the necessary buildings, to

furnish dormitories for its students, or provide boarding houses for them; nor has it been able to erect other buildings necessary for homes for its professors—homes for its mechanics engaged in erecting school buildings, etc. In order to have these buildings erected for the use and benefit of the University, and to retain control thereof, the University, from the beginning, adopted this method of permitting tenants or lessees to erect buildings, and to permit them to occupy them, for long terms at a small rental, in order that, in the end, the University would become the owner of the buildings, and would have in the meantime, had the benefit of these necessary improvements on the University domain.

The village of Sewanee is strictly a university town. Practically every person there is either directly or indirectly connected with the University, as explained in detail by the testimony of the Vice-Chancellor (R., pp. 157 and 158). Neither this University, however, nor the village owned by it, has ever been a burden to the taxpayers of the State or county. Its property is enclosed by fences and gates provided by the University, and it is required to keep up all the roads and streets in this enclosure. This it does without any expense to the State or county. Besides, the University, and the inhabitants of this village, contribute their part to keeping up the roads on the outside of the University's property by paying road taxes. In addition, they pay fully their proportional part of the personal taxes collected by the county. (R., pp. 158 and 159.)

In all its struggle with poverty, and in building up this splendid institution, in the heart of the State, the complainant University has never received one dollar's donation from either the State of Tennessee or the county of Franklin. It has been supported, fostered and built up by private donations.

On the other hand, the University has given in free tuition to the children of the county and State many thousands of dollars. (R., p. 159.) In this situation we can see no injustice in requiring the officers of the State and County to respect the solemn obligation of the State of Tennessee, and leave this institution free from the burden of taxation, in its splendid

struggle to realize the hopes of its founders, and the thousands of people interested in its success.

Respectfully submitted,

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APPENDIX.

CHARTER OF THE UNIVERSITY OF THE SOUTH

"Whereas, sundry citizens of the State of Tennessee, Alabama, Georgia, North Carolina, South Carolina, Louisiana, Texas, Mississippi, and Florida, contemplate establishing a university, to be located in the State of Tennessee, at a place which shall be conveniently accessible to the citizens of said States, which university is to be under the control and government of the Protestant Episcopal Church, subject to such rules, regulations, and restrictions, as hereinafter set forth:

"And Whereas, the security of society, the supremacy of the law, the preservation of liberty regulated by law, the perpetuity of our institutions and of the Union—all are, at least, dependent upon the prevalence of the people, and sound moral sense among them:

"And Whereas, it is to the interest of the State, and, indeed, of every State, to encourage the erection of Seminaries of Learning; therefore,

"Section 1. *Be it enacted by the General Assembly of the State of Tennessee*, That James H. Otey, David Pise, Francis B. Fogg, John Armfield, Thomas Atkinson, M. Ashley Curtis, Thomas Ruffin, Thomas D. Warren, Thomas F. Davis, Alexander Gregg, J. L. Manning, William Allston Pringle, Stephen Elliott, N. H. Cobbs, Henry C. Clay, C. T. Pollard, L. H. Anderson, William M. Green, W. W. Lord, George S. Yerger, Eugene Hinton, Leonidas Polk, W. T. Leacock, Geo. S. Guion, William M. Mercer, J. W. Dunn, E. B. Nicholds, J. E. Nicholson, Francis M. Rutledge, G. R. Fairbanks, Geo. Whitfield, J. J. Scott, and such other persons or person as may be hereafter appointed trustees of said University, in pursuance of the constitution and by-laws thereof, be, and they and their successors are hereby, constituted a body corporate and politic,

in fact and in name, by the name of 'The University of the South,' and by that name shall have perpetual succession, and a common seal; and shall be capable in law of suing and being sued, and shall have the power to purchase, receive by donation or otherwise, and to possess, hold, alien and dispose of property of all kinds and description, to be held in fee simple or otherwise; subject, nevertheless, to such restrictions and conditions as are contained in this charter.

"SECTION 2. *Be it further enacted*, That said trustees shall have power to assemble at such time and place as may be designated by the President of the Board, for the purpose of organizing said institution and of forming a constitution for the government of said University. A majority of said trustees shall constitute a quorum for such purpose. Said trustees shall have power in and by said constitution to designate how and by whom and in what way the said University shall be governed; and said constitution, when adopted, may be altered or amended in such manner as may be provided for in said constitution. Said Board shall keep a minute of their proceedings.

"SECTION 3. *Be it further enacted*, That said Board shall meet at least once a year, at the University, when the buildings are erected; but they may be called together in extra session, in such manner as may be provided for in said constitution, or by the by-laws of said institution.

"SECTION 4. *Be it further enacted*, That said trustees shall have power to appoint committees, all the members of which shall not be required to belong to the Board of Trustees, to perform duties which may be delegated to them by said trustees.

"SECTION 5. *Be it further enacted*, That all subscriptions, donations, devises, or bequests made upon the faith of the terms, conditions, or stipulations set forth in the constitution of said University, shall be governed thereby, and the subsequent change or alteration of said constitution shall not have the effect to alter the terms, conditions, or stipulations of said subscription, donation, bequest or devise.

"SECTION 6. *Be it further enacted*, That said trustees shall appoint a President and shall have power, from time to time,

to make by-laws and ordinances for the government of said University, not inconsistent with the constitution thereof, and for the appointment of professors, and other officers, and for regulating the duties and conduct of the officers, professors, and students, fixing the salaries of the officers, etc., etc.; provided the same be not inconsistent with the constitution and laws of this State, or of the United States.

"SECTION 7. *Be it further enacted,* That upon the death, resignation, or removal of any of said trustees, the vacancy occasioned thereby shall be supplied in the manner provided in the constitution.

"SECTION 8. *Be it further enacted,* That said University shall have full power to establish literary and scientific departments and those of law, theology and medical science, and such other departments as said University may see proper; and to confer upon students, or any other person, the degrees of Bachelor of Arts, Master of Arts, or any degree known and used in any college or university, and shall enjoy all other powers and immunities incident to corporations of this description.

"SECTION 9. *Be it further enacted,* That said University shall be established and located at Sewanee, on the Cumberland Mountains, in or near Franklin County, or at any point the Board of Trustees may hereafter designate in the State of Tennessee, the site to be selected by the trustees, or by such person or persons as they may appoint; which site shall continue until changed by the trustees according to the provisions of the constitution.

"SECTION 10. *Be it further enacted,* That said University may hold and possess as much land as may be necessary for the buildings, and to such extent as may be sufficient to protect said institution and the students thereof, from the intrusion of evil-minded persons who may settle near said institution, said land, however, not to exceed ten thousand acres, one thousand of which, including buildings and other effects and property of said corporation, shall be exempt from taxation as long as said lands belong to said University.

"SECTION 11. *Be it further enacted,* That no misnomer or misdescription of said corporation in any deed, will, gift, grant, devise, or other instrument of contract, or conveyance shall abate or defeat the same, but the same shall take effect in like manner as if the corporation were regularly named. Provided, it shall be sufficiently described to ascertain the intention of the parties.

"SECTION 12. *Be it further enacted,* That this act be and the same is hereby declared to be a public act.

"SECTION 13. *Be it further enacted,* That this act take effect from and after its passage.

"DANIEL S. DONELSON,
"Speaker of the House of Representatives.

"JOHN C. BURCH,
"Speaker of the Senate."

Passed January 6th, 1858.

I, F. N. W. Burton, Secretary of State, do hereby certify that the foregoing is a true copy from the original Act on file in my office.

In witness whereof I have hereunto set my hand and affixed the great seal of the State, this 15th day of January, 1858.

F. N. W. BURTON,
Secretary of State.

An Act to Amend an Act of January 6th, 1858, Chapter 29th of the Private Laws, Entitled, "An Act to Establish the University of the South."

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee,* That Stephen Elliott, Daniel Griffin, and J. Hamilton Couper, be and they are hereby appointed additional trustees to said University of the South.

SECTION 2. The said University of the South shall have power and authority to receive donations, and grants of land

in addition to the — of acres specified in the Tenth Section of the charter: Provided, That, if said additional donations, or grants, are of lands in the State, that such lands — sold and disposed of by the University and converted into personal securities or State bonds.

SECTION 3. The said University of the South shall have a right to establish such police and municipal regulations as may be necessary for the preservation of order and the enforcement of the by-laws of said University; the same to be consistent with the laws of the United States and of this State. That the foregoing shall be the amendment of the charter of said University.

SECTION 4. *Be it further enacted,* That this Act shall take effect from and after its passage.

(Signed) W. C. WHITTHORNE,
Speaker of the House of Representative.

TAZ W. NEWMAN,
Speaker of the Senate.

Passed January 19th, 1860.

STATE OF TENNESSEE:

I, J. E. R. Ray, Secretary of State, hereby certify that the foregoing Act is a true copy of the enrolled Act, now on file in my office, passed by the Legislature of Tennessee on the 19th day of January, 1860..

In testimony whereof I have hereunto set my hand and affixed the great seal of the State, at office in Nashville, on this 3d day of February, A. D. 1860.

(L. S.) J. E. R. RAY,
Secretary of State.

(See Rec., pp. 2 to 5.)

LEASE CONTRACT.

The following is exhibit "2" to the cross-examination of B. L. Wiggins, viz.:

Memorandum of Agreement made this — day of —, A. D. —, between the University of the South, party of the first part, and ——— party of the second part, Witnesseth, That the said party of the first part doth hereby release to the said party of the second part all that certain lot and premises situated at Sewanee, Franklin County, Tennessee, being part of the domain of said University of the South, and described as follows:

For a period of — years from this date at an annual rent of $— per year, payable each year in advance, and this lease being expressly made subject to the provisions of the Charter, Constitution, and Statutes of said University of the South, as well also to the regulations for leasing the domain of said University of the South established by the Board of Trustees. And the said party of the second part agrees with the party of the first part that — will pay the rent above specified in manner aforesaid, and all taxes and assessments upon said premises; and — doth further covenant and agree that during the said term hereby granted — will not, nor shall — heirs, or assigns, sell, or permit to be sold upon said premises hereby leased, any ale, beer, wine, or any liquors whatever; nor allow gambling of any description upon said premises, nor allow to be kept therein any Billiard Table, Shooting Gallery or Bowling Alley unless permission to keep the same shall have been given by the Commissioner of Buildings and Lands; nor suffer any business to be carried on injurious to the interests of the University; nor permit the erection thereon of any church, chapel, or place of religious worship, without the consent in writing of the said University of the South.

And it is further agreed: That the said premises shall not be sub-let, nor this lease assigned or transferred without the consent in writing of the Commissioner of Buildings and Lands. And it is further covenanted and agreed that any violation of the above restrictions and provisions shall cause this

lease to end and determine, with the right to said party of the first part to re-enter upon said premises. And it is further agreed that in all cases of transfer, the University of the South shall have the refusal. And at the expiration of the present term the University of the South shall have the option of taking the premises by paying for all improvements made thereon, or may renew the lease for another term of — years, on such terms as may be agreed upon by the parties respectively, and may also give a second renewal for — years; and in case the parties cannot agree upon the value of the improvements or the rental to be paid for a new term, the same shall be determined by arbitration, one of the arbiters to be selected by the Commissioner of Buildings and Lands and the other by the lessee; and in case they cannot agree, they shall call in an umpire—provided, however, that in fixing the rental for the new term, the value of the improvements shall not be taken into account as against the said party of the second part. —— heirs or assigns.

And it is further agreed that improvements to the value of — hundred dollars be made and kept on the premises by the party of the second part.

In witness whereof, The said parties have hereunto set their hands and seals the year and day first above written.

For the University of the South,

..... (L. S.)
Commissioner of Buildings and Lands.

..... (L. S.)

I hereby assign and transfer to —— the within lease and all the rights, privileges, and improvements thereon, for value received. This the — day of — A. D. —.

..... (L. S.)

I hereby agree to the above transfer.

..... (L. S.)
Commissioner of Buildings and Lands.

I hereby assign and transfer to —— the within lease and all the rights, privileges, and improvements thereon, for value received. This the — day of — A. D. —.

.....

(See Rec., pp. 175 to 176.)

Office Supreme Court, U. S.
FILED.
JAN 30 1908
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 488.

JAMES R. JETTON, REVENUE AGENT, ET AL., APPELLANTS,

vs.

UNIVERSITY OF THE SOUTH, APPELLEE.

SUPPLEMENTAL BRIEF ON BEHALF OF THE UNIVERSITY OF THE SOUTH.

WILLIAM D. SPEARS,
ARTHUR CROWNOVER,
ISAAC W. CRABTREE,
JAMES J. LYNCH,
Attorneys for the University of the South.

JOHN J. VERTREES,
ALBERT T. MCNEAL,
WILLIAM L. MYERS,
Of Counsel.

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SUPPLEMENTAL BRIEF ON BEHALF OF THE UNIVERSITY OF THE SOUTH.

May it please the Court:

By leave of court we submit the following brief in reply to the additional brief of appellant, which was filed on the day the cause was argued.

In their original brief appellants insisted that under a proper construction of section 32 of the Assessment Act of 1903 (set out on page 8 of our original brief), the State and county would be entitled to a lien only on the leasehold interests of the lessees and not upon the fee of the University. When they were met, however, with the proposition that to fasten a lien upon, and sell, the leasehold interests of the lessees would destroy the very object and purpose of the contract of exemption, they then insisted that the act in question, authorizing the assessment of taxes we complain of,

does not necessarily involve the sale even of the leasehold interests. In this they are in error. Subsection 5 of section 5 of the act (which is set out on page 8 of our brief), which provides for the assessment of taxes against the tenant for years, provides further that same—

> "shall be assessed as real estate."

Section 32 of the act, which is set out on the same page of our brief, concludes as follows:

> * * * "The whole proceeding for the collection of taxes from the assessment *to sale for delinquency* shall be a proceeding *in rem* and shall not be invalid on account of such land having been listed or assessed for taxation to any one as owner or owners, or to any person or persons not the owner or owners, or to unknown owner or owners."

Section 51 of the act provides:

> "That after the first day of May of each year, the trustee shall advertise *all real estate* upon which taxes remain due and unpaid, or which is liable for sale for other taxes, at the door of the court-house of the county on the first Monday in June following, and said advertisement shall be in the form following, to wit:"
>
> (Here follows the form and directions for advertisement.)

Section 52 provides that on the first Monday in June after said advertisement the trustee shall sell the property of each delinquent to pay the amount of taxes due from him and all costs, penalties, etc.; the sale to be to the highest bidder for cash.

The succeeding sections provide for the execution of the proper conveyance and for a report of said sales to the circuit court of the county.

Section 58 provides for a confirmation of these sales by the circuit court and the issuance of writs of possession *to*

put the purchasers at the tax sales in possession of the property thus sold for taxes.

It will be noticed from the above quotation from section 32 of the act that all taxes, whether assessed against a tenant for years, for life, or a remainder interest, shall be a lien on the fee; and, further, that the assessment shall be valid whether assessed in the name of the real owner or not, and that the entire proceedings, from assessment to sale, is one *in rem*.

This section was construed by the Supreme Court of Tennessee in the case of *Hadley vs. Hadley*, 114 Tenn., 156, in which it was held that the proceeding was one directly against the property, and that the name of the owner was immaterial. It was further held that under this act the purchaser at a tax sale *acquired an absolutely new and independent title*—not merely a derivative title from the person against whom the taxes were assessed.

The court in that case quoted with approval from *Osterberg vs. Union Trust Company*, 93 U. S., 424, as follows:

> "A lien for taxes does not, however, stand upon the footing of an ordinary incumbrance and is not displaced by a sale under a pre-existing judgment or decree, unless otherwise directed by statute. It attaches to the *res* without regard to individual ownership, and when it is enforced by sale pursuant to the statute prescribing the mode of assessing and collecting them, the purchaser takes a valid and unimpeachable title."

In just as strong language the rule is stated in *Heffner vs. Northwestern Insurance Company*, 123 U. S., 747, as follows:

> "But if the tax deed is valid, then from the time of its delivery it clothes the purchaser, not merely with the title of the person who had been assessed for the taxes and had neglected to pay them, but with a new and complete title in the land, under an independent grant from the sovereign authority, *which*

bars or extinguishes all prior titles and incumbrances of private persons, and all equities arising out of them."

The same conclusion was reached by Mr. Justice Holmes, while Chief Justice of the Supreme Court of Massachusetts, in *Emery vs. Boston Terminal Company*, 178 Mass., 172.

This rule, where the proceeding is *in rem*, that the sale vests the purchaser with a new and independent title, destroying the incumbrances and the equities in favor of all other persons, is laid down by—

Cooley on Taxation, vol. 2, p. 866.

Desty on Taxation, section 150, p. 966.

Certainly, then, if the State has a right to assess these leasehold interests, it has a right to sell same, and the equity in favor of the University growing out of the agreement on the part of the lessee not to assign without the University's consent can stand on no higher ground than an incumbrance or other contract in favor of any other person.

The power of the State to tax this property involves the power to confiscate it. In some States it is provided that where taxes are not paid at the time provided by law, the property against which the taxes are assessed shall be forfeited to the State.

Cooley on Taxation, p. 858.

In this case the act we are complaining of as impairing this exemption contract in favor of the University does not provide for simply a personal assessment against the lessee. The lessees are an unimportant factor in the assessment. Their names are not necessary to the validity of the assessment, as held by the Supreme Court in the *Hadley* case and as provided in the act. *It is a proceeding against the property.* The act authorizes the assessment, the advertisement, and the *sale* of the property. It further authorizes the issuance of a writ to put the purchaser in *possession* of the property.

To do this, it was practically conceded by adversary counsel in their argument at bar, would impair the obligation of the exemption contract set out in section 10 of complainant's charter. It would destroy the very purpose of the founders of this University in establishing the institution in the heart of a wilderness. The University would no longer be the "master of the situation," to use the language of the Supreme Court of Tennessee in the *Skidmore* case. When the leasehold interests are sold at public outcry, as provided by this act, of which we complain, then the University must pay these taxes, penalties, and costs or permit the property to be sold to dive-keepers and other objectionable persons, against whose intrusion the State guaranteed it in this charter.

Distinguishing the Comstock Lode Case.

Our attention has been called to the case of *Elder vs. Wood*, involving the Comstock Lode mining claim, which was decided by this court on last Monday. In that case, as we understand, it was decided by this court that any mining claim located on property the fee of which was in the United States Government was subject to taxation by the State of Colorado.

This principle was first decided, as we understand, by this court in the case of *Forbes vs. Gracy*, 94 U. S., 767, in which the court held that the interest of the locator was separate and distinct from that of the Government, and was property subject to taxation. In that case, however, the court held that in levying and collecting the tax no right or interest of the United States Government was affected or embarrassed.

It will be observed that the interest of the locator bears no analogy whatever to that of the lessee in this case. Under the Revised Statutes of the United States, sections 2319 to 2324, the locator of valid mining claims was vested with the absolute property in the same.

Under section 910 of the Revised Statutes it is provided as follows:

> "No possessory action between persons, in any court of the United States, for the recovery of any mining title, or any damages to any such title, shall be affected by the fact that paramount title to the land in which such mines lie, is in the United States; but each case shall be adjudged by the law of possession."

In *St. Louis Mining Company vs. Montana Mining Company*, 171 U. S., 655, this court said:

> "Where there is a valid location of a mining claim, the area becomes segregated from the public domain and becomes the property of the locator. There is no inhibition in the Mineral Lands Act against alienation, and he may sell it, mortgage it or part with the whole or any portion of it as he may see fit."

Here it will be seen that the Government retains no interest whatever in these mining claims, derives no rent therefrom, and has agreed to the sale and alienation of same. A tax on this mining claim cannot, in the slightest, affect the Government's interest nor in any manner create a burden, directly or indirectly, on any interest of the United States.

On the contrary, it has been uniformly held that the locator of Government lands could not be assessed with taxes on his interest in the land so long as the Government had any interest in the land or could be affected in any manner by the assessment.

Railway vs. McShane, 141 U. S., 600.

Kansas Pacific Railway Co. vs. Prescott, 16 Wallace, 603.

In *Stearns vs. Minnesota*, 179 U. S., 223, Mr. Justice Brewer said:

> "It has always been held that until the very last moment that leases or equitable rights of the United

States are extinguished, *no matter how trivial or small may be the right or lien reserved, the land is not subject to State taxation.*"

We call the court's attention to this fact, that in no case has the United States Government ever complained in vain of an assessment on property in which it had an interest. In no case has this court ever sustained an assessment where it has been shown that the taxes imposed any burden, either directly or indirectly, upon the United States Government, or upon any property owned by the United States Government.

Can it be supposed for a moment that this court would sustain an assessment against a lessee of property under the United States Government where the assessment would impair the rental value of the property to the Government?

Can it be assumed that this court would sustain an assessment that would result in the sale of a leasehold interest in property the alienation of which had been forbidden by the Government?

If the United States Government owned and controlled the University of the South, and conducted this school as a Government institution, with the same aims and purposes, could it be supposed that the State of Tennessee would be permitted to tax the lessees from the Government, burden the Government's rental income, and sell the lessees' interests to outsiders, in violation of the policy of the Government to keep its school free from outside interference?

Distinguishing Bank of Commerce and Other Cases.

In their additional brief appellants refer to the case of the *Bank of Commerce vs. Tennessee*, 161 U. S., 134.

In that case it was held that the exemption in favor of the shares of stock held by the stockholder could not be extended to either the capital stock of the corporation or its surplus. That was necessarily so, because the capital stock and the surplus have always been recognized as separate and

distinct items of property from the shares of stock held by the individual stockholders. That was true when the charter was granted, and if the legislature had intended to exempt the surplus and the capital stock it could have done so in apt terms.

In the case at bar, however, the leasehold interest is not a separate and distinct property from that covered by the exemption. *It is an interest in and a part of the exempt property.* As heretofore shown, at the time the charter was granted there was no law so assessing the lessee, and the language used in the charter was broad enough to exempt every interest, including the leasehold interest, from taxation.

Appellants argue that as the University parts with an interest in its property, *that interest* becomes taxable. The Supreme Court of Tennessee, in the *Skidmore case*, held that in leasing the property the leased interest *did not* become taxable. It was there held by the Supreme Court of Tennessee that leasing the property was the *only way* in which the University could use it profitably. If appellants are right, then the moment the University attempts to use its property by renting same it becomes taxable to that extent; but the Supreme Court of Tennessee held that *no interest* in the property became taxable until the University parted with the *whole title*. Its exemption is not to be frittered away by indirection simply because the University sees proper to rent this property to tenants. If so, then its exemption is absolutely of no value to it.

It is clear, we think, that the assessment and sale of these leasehold interests violate the University's charter contract for the exemption of its property from taxation in three distinct ways:

1. It lessens its rental value and destroys its income received from rents from the lessees.

2. It deters other lessees from leasing the property and erecting improvements on the University property.

3. It destroys the power of the University to say who shall and who shall not live on its property and come in contact with its students.

This University maintains, in a sense, a local government of its own, owning all the property and providing in its leases who shall live thereon and what shall and what shall not be done thereon; it controls the very life of the village. Up to this time, the people who live in this village are professors, boarding-house keepers, families living there for the purpose of sending their children to school, mechanics, tailors, and shop-keepers, either directly or indirectly connected with the University. The village is enclosed with fences and gates and kept up by the University; the streets are paved and worked at the expense of the University; and so absolute is its control of its surroundings that no municipal government is necessary to preserve peace and good order in that little University village. In this way its situation for a university for young men is ideal. The effect of taking from the University this control, subjecting the leasehold interests of all these tenants to sale for taxes—the opening of this domain to public purchasers—is too apparent to need discussion.

The maintenance of this University and the village of Sewanee has never been a burden to the State or county. All they ask is that the State and county be prevented from burdening the University.

Respectfully submitted,

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ISAAC W. CRABTREE,
JAMES J. LYNCH,
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JOHN J. VERTREES,
ALBERT T. MCNEAL,
WILLIAM L. MYERS,
Of Counsel.

Office Supreme Court, U.
FILED.
JAN 28 1908
JAMES H. McKENNEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 488.

JAMES R. JETTON, REVENUE AGENT, ET AL., APPELLANTS,

vs.

UNIVERSITY OF THE SOUTH, APPELLEE.

ADDITIONAL BRIEF FOR APPELLANTS ON RIGHT TO TAX LESSEES.

FELIX D. LYNCH,
FRANK L. LYNCH,
ISAAC G. PHILLIPS,
Attorneys for Franklin County.

IN THE

SUPREME COURT OF THE UNITED STATES.

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vs.

UNIVERSITY OF THE SOUTH, APPELLEE.

Additional Brief for Appellants on Right to Tax Lessees.

May it please the Court:

In reply to the argument of appellee that a tax on the leasehold interest of the lessee would be a burden on the university and would violate its exemption contract, we desire to call the court's attention particularly to the wording of the exemption clause of the charter, which is as follows:

> "*Be it further enacted,* That said university may hold and possess as much land as may be necessary for the buildings, and to such extent as may be sufficient to protect said institution and the students thereof, from the intrusion of evil-minded persons who may settle near said institution, said land, however, not to exceed ten thousand acres, one thousand

> of which, including buildings and other effects and property of said corporation, shall be exempt from taxation as long as said lands belong to said university."
>
> Record, pp. 3-4.

It is clear that the interest of the lessees does not come within the letter or spirit of the exemption. The interest of the lessee is not an interest which the university "holds or possesses." The exemption only applies to one thousand acres of the ten thousand which the university may "hold and possess" "as long as said lands belong to said university," and cannot protect any part of the one thousand acres, or any interest in the one thousand acres, which the university does not "hold and possess."

We insist that the buildings on this land belong to the lessees and are taxable as such, as shown by the authorities cited in the brief heretofore filed. The university recognizes these buildings as the property of the lessees. The Commissioner of Buildings and Lands, who executes the leases on the part of the university, is an insurance agent and issues to the lessees fire insurance policies describing the buildings as the property of the lessees, and in every instance where insured property has been destroyed by fire the lessees have collected the insurance (Record, pp. 181-2).

But, even if the lessees do not own the buildings, still they have an interest in the property, and that interest, whatever it is, is not protected by the exemption clause of the charter. The provision in the charter that the lands shall be exempt as long as the lands belong to the university clearly implies that as soon as the university parts with any portion of the land or any interest in the land, then the State may tax such portion or such interest so disposed of.

It is argued that at the time this charter was granted leaseholds were not separately taxable, and that therefore the exemption of the land necessarily included each and every interest in the land. If we read into the exemption of the land "each and every interest therein," then we must read the same expression into the limitation of the exemption, in which case the exemption clause would mean that each and every interest in the land is exempt as long as each and every interest in the land belongs to the university. The State is not attempting to tax any interest owned, held or possessed by the university.

It is argued by appellee that the State is attempting to tax the rents derived by the university from this land, and the Income Tax Case and other cases are cited as authority for the propositon that a tax on the rent is a tax on the land. The authorities would be in point if the State was attempting to tax the rents derived by the university from this land (which amount to $2,867 per annum) (Record, pp. 181-190). But the State is not attempting any such thing, but proposes to tax the lessees on the value of their investments in these leaseholds.

Appellee argues that the State cannot tax the interest of the lessees because, it insists, the exempt university could not then lease its lands on such favorable terms, and the tax would therefore become a burden on the university. While we think such a burden is too remote and indirect to require serious consideration, still if it is a burden it is one resulting from the exercise of a right the State has never relinquished

Assuming that this tax places a burden on the university, can this case be distinguished from the principles governing the Tennessee Bank Cases, wherein it was held that under the

charter the shares of stock in the hands of the shareholders were exempt from taxation, but, nevertheless, the State had the right to tax the surplus of the bank?

> Bank of Commerce *v.* State of Tennessee, 161 U. S., 134.
>
> County of Shelby *v.* Union & Planters' Bank, 161 U. S., 149.

In these cases it was argued that a tax on the surplus of the bank would place a burden on the stock which was exempt from taxation. In the opinion in the Bank of Commerce case (p. 148) Mr. Justice Peckham said:

> "It may be true that the general effect of a tax on this surplus might indirectly operate upon the shareholder by possibly lessening the value of his shares to some extent, but that is not the same as if a tax had been laid upon those shares."

Nor can this case be distinguished from the universally accepted rule that a State may tax the property of a corporation and also its bonds in the hands of the bondholder.

If the university should issue bonds secured by mortgage on this property, could it be insisted that the State had no right to tax the holder of the bonds? How can the right to tax the lessee be distinguished from the right to tax the bondholder or mortgagee? The tax against the owner of the bonds would burden the university, by lessening the value of the bonds, just as directly as the tax against the lessee would burden by lessening the value of the lease.

The principles governing the case at bar on the question of the alleged burden on the university by taxation of the lessee are discussed at length by Mr. Justice Shiras in Thomas *v.* Gay, 169 U. S., 264.

In that case certain Indian tribes had leased their lands, which were exempt from taxation, for grazing purposes. The Legislative Assembly of Oklahoma attempted to tax the cattle of the lessees grazing on the said lands. This tax was resisted on the ground that it would destroy the rental value of the land, and so, in effect, violate the exemption.

Replying to this argument, the court said:

> "But it is obvious that a tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians."

The court further said (p. 274):

> "The suggestion that such a tax on the cattle constitutes a tax on the lands within the reasoning in the case of Pollock *v.* Farmers' Loan & Trust Company is purely fanciful. The holding there was that a tax on rents derived from lands was substantially a tax on the lands. To make the present case a similar one the tax should have been levied on the rents received by the Indians and not on the cattle belonging to third parties."

It is argued that the fact that this property was exempt from taxation has always been taken into consideration in fixing the amount of the rents to be paid by the lessees. This fact can hardly be material in view of the fact that the university only receives a nominal rental from the lessees, and so regards it (Record, p. 171).

We call the court's attention to the fact that the leasage or rentals received by the university from the lessees is from $1 to $25 per annum per lot, amounting in the aggregate to the sum of $2,867 (Record, pp. 183-191).

Even if the exemption is taken into consideration in making the lease, and if that exemption could make any difference in the leasage received, the State has not granted to the university any exemption that it can barter away, but the exemption, on its face, is personal to the university.

Counsel for appellee cite several cases in which it has been held by State courts that the lessee of exempt property was not taxable. We call the court's attention to the fact that in every one of these cases the decision was based either on the ground that the State had made no provision for the taxation of leasehold interests as such, or on the ground that in the particular case the exemption was one that attached to the land.

The case of University *v.* Skidmore is relied on by appellee. That was an effort on the part of the State to compel the university to pay taxes on the lands which it had leased; and the Supreme Court of Tennessee properly held that that could not be done.

Respectfully submitted,

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